TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 208 40.

EDWARD E. O'BRIEN, APPELLANT,

vs.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED APRIL 26, 1895.
CERTIORARI AND RETURN FILED MAY 15, 1895.

(15,881.)

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(15,881.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 266.

EDWARD E. O'BRIEN, APPELLANT,

vs.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States Circuit Court of Appeals for the Second Circuit.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, Libellants and Appellees,

versus

EDWARD E. O'BRIEN, Respondent and Appellant.

Statement.

The names of all the original parties are set forth in the above title. By the final decree, it was adjudged that the libellants Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs had no interest, and the libel as to them was dismissed.

This suit was commenced on July 20, 1887, on which day the above-named libellants filed their libel against the above-
2 named respondent in the district court of the United States for the southern district of New York. The respondent duly appeared in said cause, and on August 2d, filed stipulation for value in the sum of $10,000.

On August 4, 1887, respondent filed exceptions to the libel in that (1) it did not state the nature of the action; and (2) that it did not state a cause of action against the respondent. Said exceptions came on to be heard before the Hon. Addison Brown, judge of said district court, on the 10th day of April, 1888, who rendered his decision on the 6th day of June, 1888, and on the 27th day of June, 1888, an order was duly made and entered overruling the first and sustaining the second of said exceptions, and ordering that, unless said libel be amended, the respondent have a final decree against the libellants, dismissing their libel with costs. On July 28, 1888, libellants filed an amended libel, the amendment consisting in the addition to the fourth article of the libel of the allegation that the condition and character of the ship *Andrew Johnson* was such that she could not by repairs be made fit to carry her cargo to the port of destination, nor be fitted to carry any portion thereof forward except by making heavy repairs; the transshipment of 8,449 bags of cargo on the *Mary J. Leslie*, and that in place of transshipping the remaining portion of said cargo to other bottoms and forwarding the same to its destination, which would have been the proper course to pursue, the respondent, for his own advantage, and not for the advantage of the libellants, elected to carry forward the said remainder of the cargo, and to that end discharged and warehoused a large portion of said cargo and made extensive repairs to the ship. And further, in alleging in the sixth article the issue by the *Mary J. Leslie* of her bill of lading, a copy of which was annexed to such amended libel.

On September 27, 1888, respondent filed exceptions to said

amended libel in that (1) it did not state the nature of the
3 action; (2) that it did not state a cause of action against the respondent by reason of the absence of any averment of the performance of a condition precedent to the validity of any bottomry and respondentia, to wit, communication had by the master before execution thereof with the respective owners of the cargo; and (3) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the said district judge on the 28th day of November, 1888, and on the 5th day of December, 1888, an order was made and entered overruling the first and second of said exceptions and sustaining the third exception, and ordering that unless the libel be further amended that the respondent have a final decree against the libellants dismissing the libel, with costs.

On January 4, 1889, libellants filed a second amended libel, the amendment consisting in the addition to the fifth article of an allegation that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., of Lima, Peru, to defray the expenses of repairs, &c., and an allegation that the libellants, not being fully advised of the circumstances and believing that the bond was properly and necessarily issued, assented; an amendment of the sixth article alleging that the libellants believed that they were in law bound to make payment of the bond to redeem their cargo; and the addition to the seventh article of an allegation that the ship *Andrew Johnson* was of the value exceeding $15,000 at the time in question. On January 28, 1889, respondent filed exceptions to said libel in that (1) it did not state the nature of said action; (2) that it was ambiguous and uncertain in averring in article 5th that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., and thereafter averring that Grace Brothers and Co. advanced said sum to
the master; (3) that it did not state a cause of action within
4 the admiralty and maritime jurisdiction of the court against respondent, and (4) that it did not state a cause of action against respondent.

On October 24, 1890, on motion of libellants, an order was made allowing the libellants to further amend their libel by adding to the sixth article thereof the following:

"The said loss of the said ship *Andrew Johnson* and her cargo on the said voyage from Callao to Hamburg was due to her collision with the British ship *Thirlmere*, and it appearing that said collision was due solely to the fault of those navigating the said ship *Thirlmere*, the respondent or his privies have, through appropriate legal proceedings in the courts of Great Britain, compelled the owners of the said ship *Thirlmere* to pay on account of the loss of the said ship *Andrew Johnson* and her freight the sum of £6,557 9s. 6d. and have collected and received the same," and on October 28, 1890, libellants filed their amended libel in conformity with said order.

On June 22, 1891, respondent filed his exceptions and answer to said amended libel.

The cause was tried before Hon. Addison Brown, district judge, on November 22, 1893, who rendered his decision on February 5, 1894, in favor of libellants. The interlocutory decree, with an order of reference to Wm. A. Walker, Esq., special commissioner, to ascertain and report the amount the libellants were entitled to recover, was entered on April 13, 1894.

On April 10, 1894, the respondent applied to the court for leave to amend his answer by setting up additional defences of laches on the part of the libellants and *res adjudicata*. On the 19th day of April, 1894, an order was made and entered denying said motion.

The commissioner's report was filed on June 5, 1894, whereby he reported due the libellants the principal sum of $6,091.73.

5 On June 23, 1894, George A. Black was substituted as proctor for respondent.

The final decree herein was entered on July 16, 1894.

Respondent's notice of appeal was filed on July 17, 1894.

United States District Court, Southern District of New York.

BRICE ALLAN MILLER *et al.*
vs.
EDWARD E. O'BRIEN.
} Exceptions to Amended Libel.

And now comes the respondent herein, Edward E. O'Brien, by Sidney Chubb, his proctor, and excepts to the amended libel and complaint of the libellants herein as follows:

First Exception.

He excepts specially to the said amended libel and complaint for that the same does not state in the first folio thereof the nature of the said action.

Second Exception.

He excepts specially to the said amended libel and complaint for that it does not state a cause of action against this respondent by reason of the absence therefrom of any averment of the performance of a condition precedent to the validity of any instrument of bottomry and respondentia, to wit, communication had by the master before execution thereof with the respective owners of the vessel and of the cargo alleged to be hypothecated thereby.

6 *Third Exception.*

He excepts generally to the said amended libel and complaint, on the merits, for that it does not state a cause of action against this respondent.

Dated New York, August 3, 1887.

SIDNEY CHUBB,
Proctor for Respondent.

(Endorsed:) Exceptions to amended libel. Filed Sept. 27, 1888.

At a stated term of the district court for the southern district of New York, held at the court-rooms, on the 28th day of November, 1888.

Present: Honorable Addison Brown, district judge.

BRICE ALLAN MILLER, THOMAS DENISON COMBER, JOHN MANLY Lowe, John Isidaile Smaill, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, Libellants,

vs.

EDWARD E. O'BRIEN, Respondent.

The respondent having filed exceptions to the amended libel filed by the libellants above named, and the said exceptions having this day duly come on to be heard, now, after hearing Sidney Chubb, Esq., in behalf of the respondent in support of said
7 exceptions, and Wilhelmus Mynderse, Esq., in behalf of the libellant- in opposition thereto, and due deliberation being had, it is now, on motion of Sidney Chubb, proctor for respondent—

Ordered, that the first and second exceptions of the respondent be and the same hereby *is* overruled, and that the third of the said exceptions of the respondent be and the same is hereby sustained on the merits, and on like motion it is further—

Ordered, that unless the respondent's taxed costs be paid and the libel of the said libellants be further amended within twenty days after the service of this order upon the proctors for the libellants, that the said respondent, Edward E. O'Brien, have a final decree against the said libellants dismissing their said libels with costs.

ADDISON BROWN.

(Endorsed:) Order. Filed Dec. 5, 1888.

To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

The amended libel and complaint of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs against Edward E. O'Brien, in a cause of action civil and maritime, of the kind and nature hereinafter more fully described, alleges and articulately propounds as follows, to wit:

First. At all the times hereinafter mentioned the libellants, Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, were merchants, doing business in Valparaiso, Chili, under the firm name of Gibbs & Company; and the libellants, Henry Hucks Gibbs, Augustus Sillem,
8 Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs, were merchants and copartners, doing business in the city of London, England, under the firm name of Antony Gibbs & Sons.

Second. At all the times hereinafter mentioned up to the time of the loss of the ship *Andrew Johnson*, the respondent, Edward E. O'Brien, of Thomaston, Maine, was the sole owner of the said ship.

Third. In the months of June and July, 1884, the libellants, composing the said firm of Gibbs & Company, at the instance and request of the respondent and his agents, shipped on board the said ship *Andrew Johnson*, at Iquique bay, ten thousand three hundred and ninety-nine (10,399) bags of nitrate of soda, and on board the same vessel, at the port of Caleta Buena, nine thousand five hundred and forty-four (9,544) bags of nitrate of soda, to be transported in said vessel to Hamburg, Germany, and there to be delivered to the order of said firm of Messrs. Antony Gibbs & Sons, of London, and the respondent engaged to so transport and deliver the said cargo.

Fourth. On the 15th day of July, 1884, the said ship, with all of the aforesaid cargo on board, sailed from Caleta Buena for Hamburg, but she was at the time, as was known or should have been known to the respondent, unseaworthy and unfit for the voyage upon which she was bound, and thereafter, by reason of being in such unseaworthy and unfit condition, she began to leak badly and fell into distress, and was compelled to and did seek a harbor of refuge and put into the port of Callao, Peru, as such harbor of refuge, where she arrived on the 4th day of August, 1884, making much water. The condition and character of the said ship was such that she could not by repairs be made fit to carry her said cargo forward from Callao to its port of destination, nor
9 could she be fitted to carry any portion thereof forward except by making heavy repairs; and thereupon the respondent transshipped eight thousand four hundred and forty-nine bags of the said cargo on board the British bark *Mary J. Leslie*, and in place of transshipping the remaining portion of his said cargo to other bottoms and forwarding the same to its destination, which would have been a proper course to pursue, did, for his own advantage and not for the advantage of the libellants, elect and determine to carry forward the said remaining portion of his said cargo to its destination by the *Andrew Johnson*, and to that end discharged and warehoused a large portion of his said cargo, and made extensive repairs to his said ship.

Fifth. Having thus incurred large expenses in making the necessary repairs to his vessel and in supplying her to continue her voyage, and in transshipping the said portion of the cargo to the *Mary J. Leslie*, and in other matters pertaining to the seeking of the harbor of refuge, repairing his said vessel and preparing to carry and forward his cargo, the respondent, as the libellants are now informed and believe, supplied funds to the master, or caused funds to be so supplied by Messrs. Grace Bros. & Co., merchants of Lima, Peru, to defray the said expenses so incurred and so to continue the voyage and carry or forward the cargo, which expenses amounted in all to thirteen thousand two hundred and thirty-seven and seventy-two one-hundredths (13,237.72) Peruvian soles, equivalent to two

thousand two hundred and twelve pounds five shillings and nine pence (£2,212, 5s. 9d.), British sterling, and thereupon the said master of the *Andrew Johnson* did, at the instance of the respondent, and for his benefit, execute a bottomry and respondentia bond on the 15th day of September, 1884, to the said Messrs. Grace Brothers & Co., hypothecating to them, or their order, the said ship *Andrew Johnson*, her boats and apparel and cargo, including the
10 eight thousand four hundred and forty-nine bags of cargo transferred to the *Mary J. Leslie* as aforesaid, and her freight, in the sum of two thousand five hundred and ninety-nine pounds eight shillings and nine pence (£2,599, 8s. 9d.) British sterling, being the amount of said costs and expenses so incurred as aforesaid, together with maritime interest or premium thereon at the rate of seventeen and one-half (17½) per cent.; a copy of which bond or obligation is hereto annexed marked "A," and made a part of this amended libel. And thereupon the said firm of Grace Brothers & Co. advanced, as aforesaid, to the said master the said sum of two thousand two hundred and twelve pounds five shillings and nine pence (£2,212, 5s. 9d.), British sterling, in manner aforesaid, which sum was applied by the said master in paying and defraying the costs and expenses so incurred as aforesaid. The libellants, not being fully advised of the circumstances, and believing that the said bond was properly and necessarily issued, assented.

Sixth. Thereafter, and on the 25th day of September, 1884, the said bark *Mary J. Leslie* issued her bill of lading for the said eight thousand four hundred and forty-nine bags of nitrate of soda transshipped to her as aforesaid, engaging to transport the said nitrate of soda to Hamburg, Germany, and there deliver the same pursuant to the terms and conditions of said bill of lading, a true copy of which bill of lading, with its marginal notes and endorsements is hereto annexed, marked "B," and made a part of this amended libel; and in due course the said bark sailed from Callao and arrived at Hamburg, Germany, with said nitrate of soda on board. The master of the said ship *Andrew Johnson* and the respondent, notwithstanding the premises, then failed and neglected to pay the said bond, and the said ship *Andrew Johnson* and the remaining cargo and freight having become a total loss on their voy-
11 age from Callao to Hamburg, the holders of said bottomry and respondentia bond did demand of the libellants, who were the owners of the said eight thousand four hundred and forty-nine bags of nitrate of soda on board the *Mary J. Leslie*, payment of the full amount of said bottomry and respondentia bond (£2,599 8s. 9d.), which was a liability and obligation of the respondent, under the penalty of the condemnation of their said cargo, which payment the libellants, being still in the belief that the said bond was properly and necessarily issued, did make to the holders of said bond, on or about the 17th day of March, 1885, as they believed they were bound in law to do to redeem their said cargo from the said hypothecation. And in no other way could the libellants get delivery and possession of their said cargo.

The said loss of the said ship *Andrew Johnson* and her cargo on

the said voyage from Callao to Hamburg was due to a collision with the British ship *Thirlmere;* and it appearing that said collision was due solely to the fault of those navigating the said ship *Thirlmere*, the respondent or his privies have, through appropriate legal proceedings in the courts of Great Britain, compelled the owners of said ship *Thirlmere* to pay, on account of the loss of said ship *Andrew Johnson* and her freight, the sum of £6,557 9s. 6d., and have collected and received the same.

Seventh. The libellants allege that of the charges and expenses incurred at Callao as aforesaid, and which the libellants have paid as aforesaid, the sum of one thousand three hundred and seventy-six pounds and seven shillings (£1,376 7s.), together with seventeen and one-half (17½) per cent. maritime interest thereon, amounting in all to the sum of one thousand six hundred and seventeen pounds four shillings and three pence (£1,617 4s. 3d.), British sterling, were charges specially made and incurred by and for the benefit of the said ship *Andrew Johnson* and her freight and the
12 owner thereof, and at his instance and request; that the said ship was of a value exceeding fifteen thousand dollars at the time the said charges were made.

Eighth. The libellants have made demand upon the respondents for the payment to them of the said sum of one thousand six hundred and seventeen pounds four shillings and three pence (£1,617 4s. 3d.), British sterling, equivalent in United States money to seven thousand eight hundred and seventy $\frac{16}{100}$ dollars ($7,870.16), with interest thereon from March 17, 1885, but the said respondent has refused to pay the same, or any part thereof.

Ninth. The said Edward E. O'Brien, respondent herein, has appeared in this action by a proctor, and has given security under the original libel.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, the libellants pray the judgment and decree of this court in their favor against the said respondent Edward E. O'Brien, and that the appearance and security given by the said respondent under the original libel stand as an appearance and security under this amended libel according to the course and practice of this court.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

Willhelmus Mynderse, being duly sworn, says: That he is one of the firm of Butler, Stillman & Hubbard, proctors for the libellants named in the foregoing amended libel, and that he has read the said amended libel and knows the contents thereof, and the same is true according to his best information and belief. Deponent
13 further says that his belief is based upon information given to him by the libellants in correspondence with his said firm through solicitors of London, England, and from an inspection

and examination of the alleged original bottomry and respondentia bond and alleged original shipping documents, and an adjustment and statement made by qualified and professional accountants of the alleged costs and expenses alleged to have been incurred in Callao, and that he believes his said information to be true. Deponent further says that the reason this verification is made by deponent and not by one of the libellants is that the libellants are in Valparaiso, Chili, or in London, England, as deponent is informed and believes, and no one of them is within this district or within the United States.

WILHELMUS MYNDERSE.

Sworn to before me this 27th day of October, 1890.

GEORGE CROMWELL,
[L. S.] *Notary Public, Richmond County.*

Certificate filed in N. Y. Co.

A.

Bottomry and Respondentia Bond.

Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship or vessel called the *Andrew Johnson*, of Thomaston, Maine, of the measurement of nineteen hundred and thirty-eight tons or thereabouts, now lying in the port of Callao, am held and firmly bound to Messrs. Grace Brothers & Co., carrying on business at Lima and Callao under the firm of Grace Brothers and Company, in the penal sum of thirteen thousand two hundred and thirty-seven Peruvian silver soles 14 $\frac{72}{100}$, at forty pence to the sole, equal to two thousand two hundred and twelve pounds 5s. 9d. of good and lawful money of Great Britain, to be paid to the said Grace Brothers & Co., or any of them, or to their or any of their order, certain attorney, executors, administrators or assigns, or to such person or persons as they or any of them shall appoint by endorsement hereon in the name of their firm of Grace Brothers & Co. to receive the same.

For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of the said vessel and her cargo of nitrate of soda, including about twelve hundred tons of nitrate of soda, transhipped on board the British bark *Mary J. Leslie*, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof, firmly by these presents, sealed with my seal. Dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, the said vessel lately sailed from Caleta Buena, laden with a cargo of nitrate of soda, bound therewith to Hamburg in Germany, and during the prosecution of the said voyage sprang a leak, whereby she took in water at sundry times to such an extent

that it was deemed expedient by the said master, for the safety of the vessel and the benefit of all concerned, to bear up for Callao, which was accordingly done, and on arrival at Callao aforesaid the vessel was duly surveyed by competent surveyors and certain repairs were recommended to be done to enable the said vessel to continue the voyage with safety, and also to transship to another vessel about twelve hundred tons of the cargo laden on board the aforesaid *Andrew Johnson* in order to enable her to proceed on her voyage with perfect safety.

And whereas, all necessary repairs and supplies have been
15 made to the said vessel, and the said portion of cargo transshipped to the *Mary J. Leslie* to enable her to prosecute her said voyage, and she is now in a seaworthy condition, and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his said vessel which he is totally unable to defray and make good, save and except upon the security of the bottom of his said vessel and her cargo and freight, hath been necessitated to raise the sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent in British sterling, for the payment of the debts incurred as aforesaid, and to enable the said vessel to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit or that of the owners of the said vessel, or in any other way than by bottomry and hypothecation of the said vessel, her boats, apparel, cargo and freight.

And whereas, the said Grace Brothers & Co. have, at the request of the above-bounden James H. Killeran, agree- to lend and advance to him the sum of thirteen thousand two hundred and seventy-three soles $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent, at forty pence as aforesaid, in British sterling, for the purposes aforesaid, upon his executing this present bond or obligation and hypothecation of the said vessel, her boats and apparel, and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Brothers & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel *Andrew Johnson*, her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight
to be earned and become payable as aforesaid and for secur-
16 ing the repayment of the said sum of thirteen thousand two hundred and seventy-three Peruvian soles $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent in British sterling, as aforesaid, the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Brothers & Co., their executors, administrators and assigns.

Now, the condition of this obligation is such, that if the said

vessel shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, their or any of their order, attorneys or attorney, executors, administrators or assigns, or unto such person or persons as they or any of them shall appoint by endorsement under their or his hand or hands in the name of their or his firm of Grace Brothers & Co., or otherwise, upon this present obligation the sum of two thousand two hundred and twelve pounds 5s. 9d. British sterling money, being the principal money of this obligation, and the further sum of three hundred and eighty-seven pounds three shillings of like money for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds 10 per centum, making together the sum of two thousand five hundred and ninety-nine pounds 8s. 9d. British sterling, and also do and shall on demand well and truly pay or cause to be paid
17 unto the said Grace Brothers & Co., or any of them, or to their or any of their order, attorneys, endorsers, executors, administrators or assigns, all such costs, charges and expenses as they or any of them shall or may have incurred, sustained or be put to in or about the recovery of the aforesaid principal money and premium, or any part thereof, or otherwise howsoever in the premises.

Or if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue.

In testimony whereof, the said James H. Killeran hath, to these present-, and to a duplicate and triplicate thereof, set his hand and seal after careful reading, in the presence of the undersigned witnesses, the day and year first before written.

J. H. KILLERAN, *Master.*

Signed in the presence of—

G. LESTER.
H. M. BROMLEY.

CONSULATE OF THE UNITED STATES,
[SEAL.] CALLAO, PERU, 15 *Sep.*, 1884.

I, the undersigned, consul of the United States of America for Callao, Peru, and the dependencies thereof, do hereby certify that J. H. Killeran, master of the American ship *Andrew Johnson*, of Thomaston, Maine, the party to the hereunto-attached bottomry bond, personally came before me, and executed the said bond in my

presence, and in the presence of the witnesses thereunto, and
18 acknowledged the same to be his free act and deed for the purposes therein mentioned.

Witness my hand and the official seal of this consulate,
[SEAL.] this the fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

H. M. BRENT,
U. S. Consul.

B.

Shipped in good order and conditioned by J. H. Killeran, capt'n of Amer. ship *Andrew Johnson*, in and upon the good ship or vessel called the *Mary J. Leslie*, whereof W. L. McLeod is master for this present voyage, and now laying at Callao and bound for Hamburg direct, eight thousand four hundred and forty-nine bags nitrate of soda, per margin, and are to be delivered in the like good order and conditioned at the aforesaid port of Hamburg (all and every the dangers and accidents of the seas and navigation of whatever nature and kind excepted); unto Messrs. Anthony Gibbs & Sons of London, or to their assigns, freight as per margin, for the said nitrate, and all other conditions of charter-party of the Amer. ship *Andrew Johnson*, dated in Valparaiso, 5th April, 1884.

8,449 bags nitrate of soda at the freight of £1,650 (one thousand six hundred and fifty) pounds sterling in full.—W. L. McLeod.

Weight & contents & quality unknown; all on board to be delivered. Not responsible for broken bags. —W. L. McLeod.

In witness whereof, the master or purser of the said ship or vessel hath affirmed to five bills of
19 lading all of this tenor and date, this second of which being accomplished the rest to stand void.

Dated in Callao, this 25th day of September, 1884.

W. L. MACLEOD.

(Endorsement.)

The 8,449 bags of nitrate of soda as per this bill of lading are included in and jointly responsible with the nitrate of soda specified in the bottomry and respondentia bond given to Messrs. Grace Bros. & Co. as security for the payment of the Amer. ship *Andrew Johnson's* disbursements in Callao.

Callao, 25th Sept., 1884.

W. L. McLEOD.

(Endorsed:) Third amended libel. Filed Oct. 28, 1890.

To the Honorable Addison Brown, judge of the district court of the United States within and for the southern district of New York:

The exceptions and answer of Edward E. O'Brien, respondent herein, to the third amended libel and complaint of Brice Alan

Miller *et al.*, libellants herein, articulately propounds and alleges as follows:

First. The respondent excepts specially to the said libel and complaint for that the same does not state in the first article thereof the nature of the said action as prescribed by the twenty-
20 third admiralty rule of the Supreme Court of the United States.

Second. This respondent excepts generally to the said amended libel and complaint on the merits, for that it does not state a cause of action against this respondent.

Third. This respondent excepts to the said amended libel and complaint for that the said libel and complaint does not state any cause of admiralty and maritime jurisdiction.

Fourth. And further answering herein, and without waiving in any way the benefit of the foregoing exceptions, and each of them, but on the contrary insisting thereon, this respondent answers the said libel and complaint as follows:

Fifth. This respondent has no knowledge as to the matters alleged in article first of said libel and complaint, and leaves the libellants to make such proof thereof as they may be advised.

Sixth. This respondent admits the matters alleged in article second of said libel and complaint.

Seventh. This respondent admits the matters alleged in article third of said libel and complaint.

Eighth. This respondent admits the matters alleged in article fourth of said libel and complaint, except the allegations touching the unseaworthiness and unfitness of his said ship *Andrew Johnson*, and the effects thereof, and touching the transshipment of cargo by respondent and the reasons therefor, and the proper course to be pursued in respect thereto, all of which this respondent denies.

Ninth. This respondent denies the matters alleged in article
21 fifth of said libel and complaint, except that he admits that large expenses were incurred by her master in making necessary repairs to his said ship, and in supplying her and in transshipping the said portion of her cargo, which expenses amounted to 13,237.72 Peruvian soles. This respondent also admits that the master of his said ship borrowed from Messrs. Grace Brothers & Co., upon credit of the instrument of bottomry and respondents therein set forth, the sum of £2,212 5s. 9d. British sterling, which sum was supplied by said master to paying and defraying the costs and expenses incurred at the said port of refuge.

Tenth. This respondent denies the matters alleged in article sixth of said libel and complaint, except that he admits the transshipment of a portion of said cargo on board the bark *Mary J. Leslie*, and the arrival of the said bark with the said cargo at Hamburg, Germany.

This respondent also admits that the master of the said ship *Andrew Johnson* and this respondent did not pay the said bond, and that the said ship *Andrew Johnson* and the remaining cargo and freight become a total loss by perils of the seas on the voyage from Callao to Hamburg.

This respondent admits that the owners of the ship *Thirlmere* having taken appropriate proceedings under the statutes of the United Kingdom of Great Britain and Ireland, obtained a decree limiting their liability for said collision to a certain sum, which they thereupon paid into court, and which said sum was distributed between the libellants and the respondent herein, and other parties and their attorneys, in part satisfaction of the damages by each of them sustained by reason of said collision; but this respondent denies that he received the said sum of £6,557 9s. 6d., and avers that the amount received by him was much less than said sum.

Eleventh. This respondent has no knowledge as to the
22 matters alleged in article seven of said libel and complaint, and leaves libellants to make such proof thereof as they may be advised.

Twelfth. This respondent admits the matters alleged in article eighth of said libel and complaint.

Thirteenth. This respondent admits the matters alleged in article ninth of said libel and complaint.

Fourteenth. This respondent denies the matters alleged in article tenth of said libel and complaint.

SIDNEY CHUBB,
Proctor for Respondent, 50 *Wall St.*, *New York*, *N. Y.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Sidney Chubb, being duly sworn, says: That he is the proctor for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Deponent further says that the reason why this verification is made by deponent and not by the respondent, is that the respondent is not a resident of this State nor of this district, and is not within this State nor district, nor within one hundred miles of any part of this district.

SIDNEY CHUBB.

Sworn to before me this 22d day of June, 1891.

EDWIN B. WOODS,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

(Endorsed:) Exceptions and answer. Filed June 22, 1891.

23 United States District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*
vs.
EDWARD O'BRIEN.

Before Hon. Addison Brown, judge.

NEW YORK, *November* 22, 1893.

Appearances: Messrs. Butler, Stillman & Hubbard (Mr. Mynderse), for libellants; Sidney Chubb, Esq., for claimant.

The claims of the libel are stated.

Mr. Chubb stated the exceptions and answer to the third amended libel

The COURT: I overrule the first and third exceptions. As to the second, I hold that that involves the merits of the whole controversy, and I will decide that when the whole evidence is in.

Mr. CHUBB: I take exception to both your honor's rulings.

I now move to amend my answer by setting up two separate and additional defenses:

First, to as much of the libellant's claim as arises out of the limited-liability proceedings in the English court as to the *Thirlmere*; the defense of laches on the part of the libellant in not sooner bringing that matter before the court.

24 Also as to the same portion of his claim, the defense *res judicata*, because passed on by the English court.

The COURT: I don't think that I ought to allow a plea of laches now by way of amendment to your answer. I deny that.

Mr. CHUBB: I except to that ruling.

The COURT: I overrule the motion to amend as to *res judicata*, there having been no notice of any such motion.

Mr. CHUBB: I except to your honor's ruling.

Mr. MYNDERSE: I now offer in evidence the depositions of the following witnesses:

James H. Killeran, master of the *Andrew Johnson*, taken in New York, August 5, 1892.

Edward E. O'Brien, respondent, examined at his home in Maine, April 18, 1892.

I have also a commission executed in London under which the following depositions were taken:

Augustus Sillen, one of the consignees of the cargo in London, Gibson & Co.

William Richards.

Mr. CHUBB: I object to the testimony of Mr. Richards because he is an average-adjuster who, upon certain documents he obtained in the usual course, made up a *pro forma* statement of adjustment according to the laws of London, while the loading of the cargo took place in one of the ports of South America, and the port of destination was Hamburg, in Germany. The testimony is irrelevant, incompetent and immaterial.

The COURT: If the deposition contained testimony as to any

facts competent to be taken into consideration here, and if it has been taken in the proper way, then it is entitled to be read to that extent. Any adjustment as a mere adjustment, made by the law of London, would not be binding here. If that deposition has
25 reference to the adjustment only and there is no testimony as to the facts of the witness' own knowledge, I exclude it here, without prejudice to the matter coming before a commissioner in case there should be a decree for the libellant hereafter. I do not rule upon what it may be worth as to the adjustment of the average, because I shall not hear that question now. When it comes before him he can determine whether there are any such differences to affect that adjustment, if so it must be excluded.

Mr. CHUBB: I except.

Mr. MYNDERSE: I have a commission which was executed in Hamburg, under which we took the depositions of Octavio Rudolph Schroeder, doctor of laws; Dr. Hermann Stockfleth, notary public; Hugo Wirtz, agent of the consignees of the cargo; Dr. Gustav Edward Nolte, doctor of laws; Dr. I. Wolffson, doctor of laws; Dr. Otto Stammann.

(Libellants rest.)

Mr. CHUBB: I offer in evidence the second deposition of the master of the *Andrew Johnson*, James H. Killeran, taken by the libellants pursuant to notice, in the city of Buffalo, in this State, on the 23d day of March, 1893.

Mr. MYNDERSE: I object to the following portion of the deposition as incompetent and immaterial:

"Q. And in your opinion what was her value at the time she entered the harbor of Callao, her port of refuge, before making repairs? A. In my opinion, the ship was worth just as much when she entered the port of Callao as she was at the time of the collision. Most of our expense was incurred in transshipping cargo, and the repairs made at Callao were not of a permanent nature."

The objection is overruled.

(Testimony closed.)

26 *Deposition of James H. Killeran, Taken at New York, August 5, 1892, on Behalf of the Libellants, Pursuant to Notice.*

Present: Butler, Stillman & Hubbard (Mr. Mynderse) for libellants; Mr. Sidney Chubb for respondent.

JAMES H. KILLERAN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. MYNDERSE:

Q. Where do you reside?

A. Buffalo, New York.

Q. Your full name is James H. Killeran?

A. Yes, sir.

Q. Were you ever master of the *Andrew Johnson*?
A. Yes, sir.
Q. She hailed from where?
A. Thomaston, Maine.
Q. Were you in command of her in the year 1884?
A. Yes, sir.
Q. Do you recall taking a cargo of nitrate of soda on board at Caleto Buena and at Iquique bay in June and July, 1884?
A. Yes, sir.
Q. Shipped by Gibbs & Sons?
A. I don't remember the shippers.
Q. (Handing witness papers.) Are these the bills of lading of the cargo?
A. Yes, sir.

The bills are offered in evidence and marked respectively Exhibits 1 and 2, August 5, 1892.

Q. Was the vessel under charter?
A. Yes, sir.
Q. (Handing witness paper.) Is this the charter-party?
A. Well, I couldn't swear to it.
Q. That appears to be the original charter-party?
A. Yes, sir.

The charter-party is offered in evidence and marked Exhibit No. 3, August 5, 1892.

Q. When you left Caleta you were bound for what port of destination?
A. Bound to Hamburg.
Q. Did you meet with any disaster, and if so what was the
27 character of it?
A. I met with heavy weather.
Q. Did that occasion your seeking a port of refuge?
A. Yes, sir.
Q. Where did you go?
A. To Callao.
Q. Did you consider it prudent after your experience in this heavy weather to continue your voyage without seeking a port of refuge and for repairs?
A. Certainly not.
Q. After arriving in Callao did you make repairs?
A. Yes, sir.
Q. Do you remember whether any surveys were called upon your vessel?
A. There were.
Q. Do you remember how many there were?
A. No, I don't.
Q. Do you remember generally what the first survey recommended?
A. No, I don't think I could remember it.

Q. (Handing witness paper.) Does that appear to be a copy of it?

A. Yes, sir.

Copy of the survey is offered in evidence and marked Exhibit No. 4, August 5, 1892.

Q. (Handing witness another paper.) Does that appear to be a copy of the second survey?

A. Well, I can't swear that this is a copy of it, but I should judge it was.

Copy of second survey is offered in evidence and marked Exhibit No. 5, August 5, 1892.

Q. (Handing witness another paper.) Look at this and see whether it is the third survey?

A. It is simply a confirmation of the facts that repairs were made.

The paper is offered in evidence and marked Exhibit No. 6, August 5, 1892.

Q. Generally, were these proceedings in Callao in accord with the recommendations of these surveys in the matter of repairing your vessel and in transshipping a portion of your cargo?

A. Yes.

Q. You did transship some of your cargo to what vessel?

A. *Mary J. Leslie.*

28 Q. (Handing witness paper.) Under that bill of lading?

A. Yes, sir.

Q. For Hamburg?

A. For Hamburg, yes.

Bill of lading is offered in evidence and marked Exhibit No. 7, August 5, 1892.

It is annexed to amended libel.

Q. How did you meet the expenses that you incurred in Callao?

A. How did I meet them?

Q. Yes; how did you raise funds for them?

A. Bottomry bond.

Q. Bottomry and respondentia bond?

A. Yes, sir.

Q. (Handing witness paper.) Is this the bond?

A. This is the original bond, is it? It is my signature, I know; yes, sir.

Bond is offered in evidence and marked Exhibit No. 8, August 5, 1892.

It is annexed to amended libel.

Q. Who were the ship's agents in Callao other than yourself?

A. Grace Brothers or Grace & Co. I don't remember just the style of the firm.

Q. (Handing witness papers.) Will you look at this bunch of

papers and state whether these constitute the vouchers for the expenses incurred by you in Callao for the paying of which the bottomry and respondentia bond was given.

A. They appear to be; yes.

Vouchers for repairs and expenses aggregating the amount of the bond less the maritime premium, are offered in evidence and are set forth in Commissioner Walker's report herewith transmitted.

Q. After making these repairs, you left Callao with part of your cargo, bound for Hamburg? Did you reach it?

A. No.

Q. What became of the *Andrew Johnson?*

A. Run into and sunk.

Q. By the ship *Thirlmere?*

A. Yes, sir.

Q. Sunk in mid-ocean?

A. Yes, sir.

29 EXHIBIT No. 1.

Shipped in good order and well conditioned by Gibbs & Co. in and upon the good ship called the *Andrew Johnson*, whereof is master for this present voyage J. H. Killeran, and now riding at anchor in the Iquique bay and bound for Hamburg direct, ten thousand three hundred and ninety-nine bags nitrate of soda, weighing thirty-one thousand nine hundred and fifty-eight quintals net Spanish weight, and are to be delivered in the like good order and well conditioned at the aforesaid port of Hamburg (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted) unto Messrs. Anty, Gibbs & Sons, London, or to their assigns, freight for the said goods and all other conditions as per charter-party dated in Valparaiso 5th April, 1884.

In witness whereof the master or purser of the said ship hath affirmed to five bills of lading all of this tenor and date, one of which five bills being accomplished the other four to stand void.

Dated in Iquique, 11th June, 1884.

J. H. KILLERAN.

(In margin.)

10,399 bags nitrate of soda:

Wgt., qtls	32,280.81 gross.
Tare, 1 %	322.81
Net qtls	31,958

Weight, contents and quality unknown. All on board to be delivered. Not responsible for broken bags.

30 Exhibit 2 is in same form as Exhibit 1. It is dated Caleta Buena, 8th July, 1884, and acknowledges shipment by Gibbs

& Co. on ship *Andrew Johnson*, now lying at anchor in the port at Caleta Buena and bound for Hamburg direct, nine thousand five hundred and forty-four bags nitrate of soda, weighing twenty-six thousand nine hundred and twenty-nine quintals ten pounds, net Spanish weight.

The charter-party (Exhibit 3) is dated Valparaiso, April 5, 1884, between Gibbs & Co., of Valparaiso, and Grace Bros. & Co., acting as agents for the owners of the ship *Andrew Johnson*, then lying at Coquimbo, and provides:

That the ship being tight, staunch and strong, well and sufficiently manned, stored and victualled, and in every respect fit to perform the voyage, shall with all convenient speed proceed in ballast to Iquique where and or at Caleta charterers agree to ship and masters to receive a full cargo of nitrate of soda in bags. That vessel shall not load more than 61,600 quintals Spanish weight. Cargo to be placed alongside of vessel's boats in bags, at shippers' expense. Bills of lading to be signed by master, "weight and quality unknown, all on board to be delivered" at such rate of freight as charterers may direct without prejudice to charter-party but at not less rate than stipulated therein. After the dispatch of vessel, loaded, should she put into any port of distress. She shall be consigned to charterers or their agent. After receiving on board said cargo the vessel shall proceed with all convenient speed to any safe port in the United Kingdom or on the continent between Havre and Hamburg, both included, as ordered, and there according to bills of lading and charter-party deliver the whole of her cargo which is to be discharged and taken from alongside in accordance with the customs of the port. Restraints of princes and rulers, earthquakes and inundations, political disturbances or impediments, fire, pirates and enemies, the dangers of the seas and navigation, from the signing of the charter-party till the conclusion of the voyage always mutually excepted. Charterers agree to pay for freight of said vessel on a true and right delivery of the cargo in port of discharge according to the charter-party and bills of lading for each, and every ton of twenty hundredweight gross, avoirdupois, English, at the rate of thirty-seven shillings and sixpence sterling if ordered to Hamburg direct, to be paid one-third in cash on arrival at the printed rate of exchange for short bills on London and the remainder on delivery in cash at the printed rate of exchange for three months' bills on London. Charterers' liability to cease on completion of loading. Owners to have full lien on cargo for freight, dead freight and demurrage.

31

EXHIBIT No. 4, August 5, 1892.

At the request of H. M. Brent, Esqre., United States consul, Callao, we the undersigned, proceeded on board the American ship *Andrew Johnson*, 1,938 tons register, J. H. Killeran, master, at present lying in Callao bay to examine said vessel, and to ascertain what would be required to be done, she having put into this port in a leaky

condition, and after a careful and conscientious examination, have to report as follows:

That we have inspected minutely all available parts of the interior, and find that the vessel has a very good appearance, beams and knees in good condition, showing no signs of working or having moved. We noted, however, in the centre of the vessel more especially that water had been entering in considerable quantities from the top side.

It is to be remarked that the cargo is very well stowed and carefully distributed in the various parts.

32 Examining the exterior of the vessel we found various butts and seams at water's edge to be very soft.

We sounded the pumps at 2.30 p. m. when we found 25 inches of water in the well. One hour later, 25½ inches were shown.

Generally speaking, she presents a good appearance, well found in spars and sails, the upper deck appears to be nearly new, so that considering the (comparatively speaking) little water made now that the vessel is lying in port,

We consider it necessary she be lightened until at least the two upper sheets of metal are out of water for further examination.

And we declare we have conducted this survey in a conscientious and careful manner.

In witness whereof, we hereunto subscribe our names the fourth day of August in the year one thousand eight hundred and eighty-four.

(S'g'd) E. M. KNIGHT,
Master Bark E. L. Mayberry.

(S'g'd) GEO. F. ELLIOTT,
Master Wm. Hales.

(S'g'd) DAVID COUTTS,
Master Carpenter.

Received for the above survey and report, the sum of one gold ounce each.

(S'g'd) D. COUTTS.
(S'g'd) G. F. ELLIOTT.
(S'g'd) E. M. KNIGHT.

I certify that the foregoing is a true copy of the original on file at this consulate.

Witness my hand and the official seal of this consulate, this the 11th day of August, 1884.

[Stamp: Consulate of the United States, California.]

(S'g'd) H. M. BRENT,
U. S. Consul.

33 EXHIBIT No. 5, August 5, 1892.

We, the undersigned, at the request of H. M. Brent, Esq., United States counsel at Callao, proceeded on the 21st August, 1894, on board the American ship *Andrew Johnson*, of Thomaston, Maine,

1,938 tons register, now at anchor in this port and of which J. H. Killeran is master, with the object of making a second survey on said vessel.

We found that, as recommended in the previous survey, the vessel had been lightened, having discharged about 900 tons of the cargo, which was deposited in the bark *Prinds Oscar*, the vessel being consequently in a better position for being examined.

After having made a thorough and careful examination of the vessel inside and out we have to report as follows:

In the 'tween-decks we found that some of the knees have been working slightly, and that the scarphs of thick stuff showed signs of having moved, otherwise the vessel presented a remarkably good appearance, sound and strong.

On deck we found that the vessel has strained considerably abreast of the fore, main and mizzen masts, and in the waterways. The spars, rigging and sails are in good order and the vessel particularly well found and kept.

On the outside we found the oakum soft, particularly at the hood ends and butts, which showed signs of the vessel having been working. One plank in the starboard after-hood ends had started and requires refastening. In the starboard forehood ends, above the metal the oakum showed signs of having been started, and apparently water had been entering freely.

Having sounded the pump well at 4 p. m. August 21st, we found 20½ inches of water, and at 8 a. m. on the 22d, 22¼ inches were found, showing that she was making ¼ of an inch per hour.

34 We therefore recommend the following repairs:

That the top side and waterways be hosed and caulked, the main decks caulked from foremast forward. The hood ends carefully overhauled, refastened where necessary and well caulked. The bilge pump put in working order.

Taking into consideration the nature of the cargo, the enormous strain it must bear on a ship of the dimensions of the *Andrew Johnson*, we are unanimously and decidedly of the opinion that at least twelve hundred tons of the cargo be forwarded in another bottom, and that with the above repairs and thus lightened she can proceed on her voyage with safety. This we consider to be in the interest of both the owners of ship and cargo.

It will also be necessary that about 600 tons of the cargo remaining in the *Andrew Johnson* be properly distributed in the 'tween-decks; all of which done we are of opinion that the *Andrew Johnson* can proceed on her voyage.

We have conducted this survey carefully and impartially. In witness whereof, we sign in Callao this 23d day of August, 1884.

(S'g'd) E. M. KNIGHT,
Master B'k E. L. Mayberry.

(S'g'd) F. C. BAILEY,
Master of B'k N. Gibson.

(S'g'd) DAVID COUTTS,
Master Floating Dock.

We have each received one gold ounce for above survey.

(S.) E. M. KNIGHT.
(S.) F. C. BAILEY.
(S.) D. COUTTS.

U. S. CONSULATE, CALLAO, *August* 24, 1884.

A true copy of the original deposited in this consulate.

A. M. BRENT,
U. S. Consul.

35 EXHIBIT No. 6, Aug. 5, 1882.

At the request of George Elster, Esqre., Lloyd's agent, Lima, we, the undersigned, proceeded to board the American ship *Andrew Johnson*, 1,938 tons register, J. H. Kelleran, master, at present lying in Callao bay, to examine said vessel and to ascertain if the repairs ordered in previous surveys had been executed, and whether the vessel were in a condition to proceed with her cargo to its destination; and after a careful and minute investigation, we have to report as follows:

That we find the repairs previously ordered to have been well executed, the top sides having been horsed and caulked, several hood ends refastened, the main deck forward recaulked and two new bilge pumps supplied.

That we find the cargo to be well stowed and carefully distributed in the vessel, thus insuring her steadiness and seaworthiness.

That the vessel is at present making no water.

And we therefore are unanimously of opinion that the *Andrew Johnson* in her present condition is thoroughly competent to carry her cargo to its destination. And we further declare that we have conducted this survey in a conscientious manner.

In witness whereof, we hereunto subscribe our names this tenth day of September, one thousand eight hundred and eighty-four.

E. JOSTE.
F. C. BAILEY,
Master N. Gibson.

DAVID COUTTS,
Master Floating Dock.

Received for the foregoing survey report the sum of one gold ounce each.

E. JOSTE.
D. COUTTS.
F. C. BAILEY.

36 Deposition of Edward E. O'Brien, taken on behalf of libellant, on April 18, 1892, at Portland, Maine, before a United States commissioner.

Q. State your name, age, residence and business.

A. Edward E. O'Brien; sixty-two years; Thomaston, Maine; ship-owner, agent and bank president.

I have been connected with the building of ships since 1856. I was not the builder of the ship *Andrew Johnson*. I was the record owner at the time of her loss. She was built by Edward O'Brien at Thomaston, Maine, in 1864, I think. In the year 1882 I became the sole owner of the ship *Andrew Johnson*. I think Captain Killeran must have joined her in the fall of 1883, as near as I can remember. When the *Andrew Johnson* was sunk, all of her cargo was lost. At the time of the loss of the ship *Andrew Johnson*, she was insured in the Boston Marine Insurance Company for one-half according to the value expressed in the policy. (Policy read by the respondent on trial.) The material portions are as follows:

By the Boston Marine Insurance Company: Edward E. O'Brien, on account of whom it concerns: In case of loss to be paid to Edward E. O'Brien, doth make insurance and cause to be insured, lost or not lost, thirty thousand dollars on ship *Andrew Johnson*, for one year from August 23, 1884, at noon. It shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance. And the said property hereby insured is valued at sixty thousand dollars. Touching the adventures and perils which the said Boston Marine Insurance Company is contented to bear and take upon itself in this voyage, they are of the seas, fire, barratry of the master (unless the insured be an owner of the vessel), and of
37 the mariners, and all other losses and misfortunes which have or shall come to the damage of the said property or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston, subject to the conditions and provisions contained or referred to by clauses of this policy. * * * Dated August 26, 1884.

The freight of the *Andrew Johnson*, at the time of her loss, was not insured. At the time of the loss of the *Andrew Johnson* by collision with the British ship *Thirlmere*, I placed her value at the same as it was valued in the policy, sixty thousand dollars. During the year 1884, and up to the time of her loss, Grace Bros., of Callao, were authorized on the part of the *Andrew Johnson* to make her charter-parties. I was informed of the making of the charter party of the *Andrew Johnson* for this voyage upon which she was lost, previous to the time of loading on board of her the cargo for the voyage.

Q. Did you at any time before the loss of the *Andrew Johnson* learn that a bottomry and respondentia bond had been executed upon the *Andrew Johnson*, her cargo and freight, to defray expenses incurred at Callao while there in distress?

A. I think I did. I am unable to state the time or through what source I heard the same.

Q. Did you learn of it before the vessel left Callao?

A. I couldn't say that I did. I couldn't answer positively either way.

Q. Did you at any time, or in any way, supply any funds to the ship *Andrew Johnson*, or her master, to defray the expenses incurred

by her at Callao while there in distress, or at any time before her loss, or any part of said expenses?

A. I think not.

Q. Did you direct any money to be supplied to the ship *Andrew Johnson* or her master, to defray such expenses, or any part of them?

A. I think not.

Q. Are you not able to answer positively either of the last two questions?

A. I am not.

38 Q. Whether or not, at the time the ship *Andrew Johnson* was at Caleta Buena, or at Iqueque, while loading her cargo for the voyage to Hamburg, or while she was at the port of Callao in distress subsequently, there were means of telegraphic communication between these ports and Thomaston, Maine?

A. I think there was telegraphic communication from Callao at that time.

I was first informed of the loss of the ship *Andrew Johnson* by collision with the British ship *Thirlmere* by a cable from Pernambuco, from Capt. Killeran, when he first reached port after the collision. Capt. Killeran and the crew of the *Andrew Johnson* after they reached Pernambuco were forwarded to Liverpool. I instructed Baring Bros. & Co., the Liverpool house, to take measures to recover damages from the owners of the *Thirlmere*. I had correspondence touching the recovery of these damages from the *Thirlmere* with R. L. Gilchrist & Co., ship brokers at Liverpool, who formerly done the ship's business, and the Boston Marine Insurance Company in Boston, and possibly with Hill, Dickinson & Co., my solicitors at Liverpool. I have no letters or cablegrams. I have searched for them and cannot find any. I presume they are destroyed. I have received from the owners of the ship *Thirlmere*, on account of the loss of the ship *Andrew Johnson* and her freight, through Baring Bros. & Co., the sum of fifty-four hundred and seventeen pounds, two shillings and fourpence, which was the net balance of their account as rendered me. Of this amount fifty-one hundred and seventy-nine pounds, thirteen shillings and sixpence was apportioned as the loss on the ship, and eight hundred and fifty-eight pounds, six shillings and eleven pence as the loss on freight, out of which were sundry charges in Baring Bros. & Co.'s account. The net amount which came to my account with Baring Bros. & Co. was five thousand four hundred and seventeen pounds, ten shil-

39 lings and fourpence. I herewith produce the whole account relating to the matter of the recovery from the owners of the *Thirlmere*, which was rendered me by Baring Bros. & Co. at the termination of the matter. This shows sundry charges paid by them relating to the suit, amounting to £635. I have in addition paid out $1,511.47 for the purpose of getting the crew to the place of trial.

I also produce the account of R. L. Gilchrist & Co., amounting to one hundred and sixty-five pounds, for disbursements advanced by them on account of the same suit.

The Boston Marine Insurance Company received through me from the ship *Thirlmere*, or her owners, in payment for the portion of the *Andrew Johnson* insured by that insurance company, a sum calculated to give them one-half after deducting certain expenses.

The insurance company paid me the sum of $30,000 due on the policy as for a total loss of the ship *Andrew Johnson*, less the sum of $2,825.49, the amount of the premium note, with interest. The insurance company paid me that sum on January 6, 1885.

On April 2, 1886, I remitted to the Boston Marine Insurance Company as the sum due the company from the amount which I had received from the owners of the *Thirlmere* for the loss of the *Andrew Johnson*, $11,456.08. A subsequent adjustment of accounts indicated that a further sum of $35.60 was due the insurance company in the matter, and that sum I remitted to them at some time subsequent to June 28, 1886.

Benjamin Thompson, Esq., proctor for respondent, waives all right to cross-examine.

EDWARD E. O'BRIEN.

40 Deposition of Augustus Sillem, taken by commission upon written interrogatories, on the 18th day of April, 1893, by Francis W. Frigout, at London, commissioner.

My name is Augustus Sillem. I am 72 years of age and upwards. My business residence is at No. 15 Bishopsgate street in the city of London, where I carry on my business as a merchant, being a partner in the firm of Anthony Gibbs & Sons of said address. In February and March, 1885, I carried on my said business as a partner in my said firm.

The members of the firm of Anthony Gibbs & Sons in February and March, 1885, were Henry Hicks Gibbs, Augustus Sillem, Alban George Henry Gibbs, James Charles Hayne and Herbert Cockayne Gibbs, and at that time the members of the firm of Gibbs & Co. at Valparaiso, Chili, were Brice Alan Miller, Thomas Dennison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor.

My firm of Anthony Gibbs & Sons were not the owners of the cargo of nitrate of soda shipped per *Andrew Johnson* at Iquique and Caleta Buena in June and July, 1884, and of that portion of said cargo subsequently transferred from the *Andrew Johnson* to the *Mary J. Leslie;* they were the consignees only; Gibbs & Co., of Valparaiso, were the sole owners of said cargo.

Mr. Hugo Wirtz acted as our agent or representative in Hamburgh upon the receipt of that portion of said cargo which reached Hamburgh on the *Mary J. Leslie*.

My firm doubted their obligation to pay the amount claimed under the bottomry and respondentia bond made by Captain Killeran, and we therefore communicated with our Hamburgh agent, Mr. Wirtz, on the subject and instructed him to obtain legal opinions on the questions upon the facts as we then knew them. The effect of these

opinions was that we were obliged on the facts then known
41 to pay the amount claimed before delivery of the cargo could be obtained. Messrs. Baring Bros. & Co. of this city were acting on behalf of the holders of the bond, and my firm made an arrangement with them under which my firm gave an undertaking in writing to pay whatever sum might be due according to the law of Hamburgh from the cargo, in consideration of which Messrs. Baring agreed to have matters settled here in London, and they telegraphed Messrs. Berenberg, Gossler & Co., their agents in Hamburgh, to withdraw the claim. At the same time my firm authorized Mr. Wirtz to pay the full amount of the freight, namely £1,650. On these arrangements being completed delivery of the cargo was given to Mr. Wirtz. This arrangement was made solely for the purpose of getting delivery of the cargo independently entirely of and without prejudice of the ulterior liability of any other person or persons under said bond. I hand to the commissioner, to be annexed hereto as Exhibit A, a true and exact copy of the undertaking given by my firm to Messrs. Baring Bros. & Co., and I also hand to the commissioner, to be annexed hereto as Exhibit B, a copy of Messrs. Baring Bros. & Co.'s letter acknowledging receipt of said undertaking.

The amount legally due from the cargo of the *Mary J. Leslie* in respect of the bond was finally determined as follows: Messrs. Baring Bros. & Co., representing the holders of the bond, instructed Berenberg, Gossler & Co, of Hamburgh, to appoint a lawyer to act on their behalf, and my firm requested Mr. Wirtz to do the same. The two persons so appointed were to decide as to the liability of the cargo for the payment of the bond *in the first instance in* whole or in part. Messrs. Berenberg, Gossler & Co. appointed Dr. J. Wolffson, and Mr. Wirtz appointed Dr. Otto Stammann. These gentlemen decided that the portion of the cargo sent forward
42 on the *Mary J. Leslie* was liable for the whole of the bond and that the receiver had to pay the whole. The said Dr. I. Wolffson and Dr. Otto Stammann are eminent and leading lawyers at Hamburg.

Messrs. Baring Bros. & Co. were acting as agents for Messrs. Grace Bros. & Co., of Lima, Peru, who had advanced the money under the bond. My firm paid £2,592 7s. 9d. to Messrs. Baring Bros. & Co.; the payment was made in London on the 17th March, 1885.

EXHIBIT A.

15 BISHOPSGATE STREET WITHIN,
LONDON, 11*th February*, 1885.

Messrs. Baring Brothers & Co., 8 Bishopsgate St. Within, E. C.

DEAR SIRS: In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., of Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia, on the cargo of nitrate of soda to our order, arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of

the said bottomry & respondentia bond, may be found to be legally due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Walton and Messrs. William Richards & Son in London, or if it be found to be governed by Hamburg law, by equally competent authorities there to be appointed by your agents and ours.

We are, dear sirs, yours truly,
(Signed) ANT'Y GIBBS & SONS.

43 EXHIBIT B.

8 BISHOPSGATE ST., WITHIN,
LONDON, 11 *February*, 1885.

Messrs. Anthony Gibbs & Sons, 15 Bishopsgate St., Within, E. C.

GENTLEMEN: With reference to your letter of this date we understand your guarantee to be equally binding should the case be decided to be governed by Hamburg law, & shall accordingly telegraph our friends in Hamburg to release the cargo of the *Mary J. Leslie*.

We remain, gentlemen, your ob't servants,
(Signed) BARING BROTHERS & CO.

Deposition of William Richards, on within interrogatories, taken by commission on April 18, 1892, before Francis W. Frigout, at London, commissioner.

My name is William Richards. I am 29 years of age and upwards My business residence is at No. 70 Gracechurch street, London, England. I am a partner in the firm of William Richards & Son, average-adjusters. In the years 1885 and 1886, I followed the occupation of an average-adjuster on the staff of William Richards & Son, but I was not then a partner in said firm.

I have followed my present occupation for twelve years last past, the business of my firm is very extensive, and as a matter of fact we do one of the most extensive businesses as average-adjusters in the city of London, and also in Newcastle-on-Tyne, England.

I have become familiar with the rules regulating the distribution of charges upon the various interests of vessel, cargo and
44 freight in cases where the expenses are incurred at a port of distress. My firm prepared a statement respecting the distribution of the expenses incurred on behalf of the *Andrew Johnson* and her cargo in Callao in 1894.

I did not prepare the statement myself personally. My father (the late William Richards, who died in June, 1886) prepared it and discussed points with me in its adjustment from time to time. I hand to the commissioner to be annexed thereto, as Exhibit C, a summary of said statement. It was prepared from documents furnished by Messrs. Anthony Gibbs & Sons.

Cross-interrogatories:

The statement here produced is made in accordance with the

law and practice in making up general average which prevails in London.

I believe there are differences between the law and practice in making up such statements prevailing in London and that prevailing in the United States.

45 EXHIBIT C.

Total bond						£2,592	7 9
The charges composing the bond appear to apply as follows:							
To ship & cargo jointly				£874	4 2		
To cargo				570	2 7		
Do.				32	0 4		
To ship and owners				1,116	0 8		
				£2,592	7 9		
General average						£874	4 2
Ship valued at				£6,600,	pays	£221	8 1
Cargo do.				18,300,	"	613	17 10
Freight				1,160,	"	38	18 3
				£26,060		£874	4 2
Cargo pays general average				£613	17 10		
Particular charges				570	2 7		
				£1,184	0 5		
Charges relating to damage				32	0 4		
				£1,216	0 9		
General average on ship	£221	8	1				
General average on freight	38	18	3				
Charges to ship and owners	1,116	0	8				
	£1,376	7	0	1,376	7 0		
				£2,592	7 9		
Total claim of Messrs. A. Gibbs & Sons on ship *Andrew Johnson* for proportion of general average & charges to ship & freight paid by Messrs. A. Gibbs & Sons						£1,376	7 0

Duplicate.

Average Adjusters
Members.
Association.

New city chambers,
London, 31st May, 1886.

WILLIAM RICHARDS.

46 Deposition of Octavio Rudolph Schroeder, taken on the within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 5, 1893.

My name is Octavio Rudolph Schroeder. I am thirty-six years old. Reside in Hamburg. I am by profession an attorney-at-law, and have practiced said profession since 1879 in Hamburg, Germany.

I am familiar with the law as administered in Hamburg in 1885 in respect to bottomry and respondentia bonds.

In reply to the inquiry as to what was the law as administered in Hamburg in 1885 in respect to the collection and enforcement of bottomry and respondentia bonds, and what were the remedies available to the holders of such bonds, I annex as part of my answer a copy of the General German Commercial Code, which was also in force in the year 1885, and which under title seven, page 153 of the fifth book, from article 680 to 701, gives the information called for.

(A translation of the articles specified by the witness is appended.)

I personally had nothing to do in the matter of the bottomry and respondentia bond made by James H. Killeran, master of the *Andrew Johnson*, bearing date Callao, September 15, 1884, but one of my partners had. I can state that on March 14, 1885, my former partner, Dr. Otto Stammann, in conjunction with the attorney-at-law, Dr. I. Wolffson, gave his legal opinion about a bottomry bond on the cargo of nitrate of soda on the *Andrew Johnson*, brought home per *Mary J. Leslie*, and that the contents of the same are in accordance with our German law.

47 Cross-examination:

I have a thorough knowledge of the English language and am now testifying in the English language.

In my opinion, no law prevailing at Hamburg prohibits parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea the bond shall thereby become null and void. I have not read the bottomry and respondentia bond referred to, but I have read the paper dated 14th March, 1885, addressed to Hugo Wirtz, Esq., and signed by Otto Stammann and I. Woolffson. I concur with the views expressed in the last-named paper in regard to the German law in general.

Deposition of Hermann Stockfleth, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 8, 1893.

My name is Dr. Hermann Stockfleth. I am fifty-four years old, reside in Hamburg and by occupation am a notary public. In February and March, 1885, I had the same occupation.

I had instructions to demand from Hugo Wirtz the payment of a certain bottomry and respondentia bond issued by James H. Killeran, master of the *Andrew Johnson*, dated Callao, September 15, 1884. I have looked at the bond annexed (a copy is set forth in the libel) and can state that it is the bond referred to. I was acting and making such demand for Messrs. John Berenberg, Gossler & Co., bankers in Hamburg. I presented the bottomry and respondentia bond to Mr. Hugo Wirtz on the Hamburg exchange, for payment on February 10, 1885. I received no payment, but Mr. Wirtz declared I must first await instructions, which I shall follow immediately. I know nothing further.

48 Deposition of Hugo Wirtz, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on August 23, 1893.

My name is Hugo Wirtz. I am forty-six years old. I reside at Hamburg, Germany; am by occupation an agent and broker. I have followed my occupation since 1877 at Hamburg, Germany. I know of the arrival of a consignment of 8,449 bags of nitrate of soda of the *Mary J. Leslie* at Hamburg from Callao in February, 1885. I had to receive, to sell and to deliver said cargo of nitrate of soda for Messrs. Anthony Gibbs & Sons, of London, on instructions received through Messrs. Henry Bath & Son, of London. The *Mary J. Leslie* and her cargo of nitrate of soda arrived at Hamburg on February 5, 1885. The bill of lading was sent to me by Messrs. Henry Bath & Son in London. Demand was made upon me in respect to the payment of a bottomry and respondentia bond affecting, or alleged to affect, the nitrate of soda on the *Mary J. Leslie*. I was requested by Messrs. J. Berenberg, Gossler & Co., of Hamburg, to lift the bottomry bond against payment of £2,599 8s. 9d. This demand seems to have been made verbally, as I did not find anything in writing from said firm amongst my papers. I cannot describe the bond, as I do not recollect its contents. The persons making such demand are bankers in Hamburg and represent Messrs. Baring Bros. & Co. in London. I do not remember whether the demand was repeated, but probably it was. On February 10, 1885, the fifth day after the vessel's arrival, the bond was presented to me by a notary public, to whom I replied that I was without definite instructions from my friends. I was informed by Messrs. Henry Bath & Sons, letter dated London, February 16, 1885, that Messrs. Baring Bros. & Co. had agreed to release the cargo on Messrs. Anthony Gibbs & Sons giving Messrs. Baring Bros. & Co. an
49 undertaking to pay "whatever might be found to be legally due." The matter was submitted on February 23, 1885, to two Hamburg lawyers, namely, to Dr. Wolffson on behalf of Messrs. Baring Bros. & Co. and to Dr. Stammann on behalf of Messrs. Anthony Gibbs & Sons, in order to decide as to the liability of the cargo for the payment of the bond in whole or in part. On March 14, 1885, I received Dr. Stammann's and Dr. Wolffson's award, saying that the cargo nitrate was liable for the whole bottomry amount, which

I forwarded the same day to Messrs. Henry Bath & Son, London, who told me in their reply of March 16, 1885, that in accordance with the award Messrs. Anthony Gibbs & Sons were arranging to pay to Messrs. Baring Bros. & Co. the amount of the bottomry bond. I have not a copy of the above award, which, as above stated, was sent to Messrs. Henry Bath & Son, London. The *Mary J. Leslie* finished discharging on February 27, 1885, and delivered 8,309 bags sound, weighing 2,033,764 pounds German gross. The value of the *Mary J. Leslie's* cargo was on her arrival at Hamburg about 9s. 3d. per hundredweight Liverpool floating conditions.

Deposition of Gustav Edward Nolte, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 17, 1893.

My name is Gustav Edward Nolte. I am forty-two years old, reside at Hamburg, am by profession attorney-at-law and have practiced such profession at Hamburg since 1874. I am familiar with the law as administered in Hamburg in 1885 in respect to bottomry and respondentia bonds. The holder of a bottomry and respondentia bond has an absolute lien upon the vessel, her cargo and her freight, all of which and each for itself are liable for the whole amount, provided it is not especially stipulated that only the vessel or the cargo or the freight are to be liable. The holder of the bond, if he is not paid, can sell the vessel or her cargo at public auction, or can attach the freight to make himself paid. The laws governing bottomry and respondentia bonds are to be found in articles 680 to 700 inclusive, of the General German Commercial Code. I had nothing to do with the bottomry and respondentia bond made by James H. Killeran, master of the *Andrew Johnson*, bearing date Callao, September 15, 1884. I know that my former senior partner, Dr. Otto Stammann, in conjunction with Dr. I. Wolffson, on March 14, 1885, gave a written opinion about the bond referred to, and I can state that this opinion was in every respect in accordance with the Hamburg laws and especially that clause of the said opinion which stated that each part of the cargo of nitrate brought forward by the *Mary J. Leslie* was liable for the full amount of the bottomry bond, provided that the value of such portion of the cargo was not less than the amount of the bottomry bond.

Cross-examination:

I have a thorough knowledge of the English language, and am testifying in the English language. One of the witnesses has already produced a copy of the General German Commercial Code, to which I have referred. I have examined this copy, and can state that it is correct.

The law prevailing at Hamburg does not prevent parties to a bottomry and respondentia bond from making an agreement, that if the vessels hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void.

I have not read the bottomry and respondentia bond in question, but I have read the paper dated Hamburg, March 14, 1885, addressed to Henry Wirts, Esq., and signed by L. Otto Stammann and I. Wolffson, and as I have already stated, I fully concur in the views expressed in the same.

51 Deposition of Isaac Wolffson, taken upon within interrogatories, before Charles H. Burke, at Hamburg, Germany, commissioner, on July 18, 1893.

My name is Isaac Wolffson; I am seventy-six years old; reside at Hamburg, and am by profession an attorney-at-law; I have practiced my profession in Hamburg since 1839. I hold the degree of doctor of law since 1837. I am familiar with the law as administered in Hamburg in 1885 respecting bottomry and respondentia bonds.

As far as I can remember, I was requested by Messrs. I. Berenberg, Gossler & Co., of Hamburg, to give a legal opinion regarding its bottomry and respondentia bond, made by James H. Killeran, master of the *Andrew Johnson*, and I think I conferred at the time with Dr. Otto Stammann. I presume that the bond annexed was submitted to me at the time, and that the fact of the loss of the *Andrew Johnson* was made known to me. I presume that I must also at the time have seen the annexed bill of lading (same is annexed to amended libel).

I annex a translation of the opinion given by me which has been handed to me, and the correctness of which I do not doubt. The opinion given in the same agrees with the laws administered in Hamburg. Analagous cases are not known to me, but the following sections of the General German Commercial Code apply to the case in question, namely, sections 504, 680 and 507 and 634, 692, 699 and 681.

(A translation of the sections specified by the witness is appended.)

Cross-examination:

I have a fair knowledge of the English language. Am having the interrogatories made to me in English, but am testifying in the German language. I have read my answers as written
52 down by the commissioner, and acknowledge them as perfectly correct. Another witness has produced a copy of the General German Commercial Code.

The law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void; moreover, the hypothecation in so far stands void, though not null, as the hypothecated articles have been sunk, however, remains valid to its full extent for the articles saved. I have read both the bottomry and respondentia bond, and the paper dated Hamburg, 14th March,

1885, addressed to Hugo Wirtz, Esq., and signed by L. Otto Stammann and I. Wolffson, and concur in the views expressed in the last-named paper.

HAMBURG, *14th March*, 1885.

Hugo Wirtz. Esq., Messrs. I. Berenberg, Gossler & Co.:

We formulate the question which you, in the names of Messrs. Antony Gibbs & Sons, and Messrs. Baring Brothers & Co., have submitted to our judgment, as follows:

"Whether the portion of the cargo of nitrate of soda of the *Andrew Johnson*, brought home per *Mary J. Leslie*, is liable for the whole amount of the bottomry bond, which was signed in Callao, and whether, consequently, the receiver of this portion of the cargo has to pay the whole of the bottomry bond, provided the value of this portion of the cargo is not less than the amount of the bottomry debt?"

This question we must answer in the affirmative, because, according to the law here, ship, freight and cargo of the *Andrew Johnson*, as well as the portion of the cargo which was transhipped into the *Mary J. Leslie*, are jointly liable for the whole amount raised
53 on bottomry at Callao, and, therefore, the *Andrew Johnson* and her cargo having become a total loss, the holder of the bottomry bond can come upon that portion of the cargo which was shipped by the *Mary J. Leslie* for the whole amount of his claim.

Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent or appear to be lent contingent upon the safety of the *Andrew Johnson*, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason, that if the bottomry bond were interpreted in this manner, the cargo of the *Mary J. Leslie* would be entirely liberated, after the loss of the *Andrew Johnson* occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested.

Yours truly,

(Signed) L. OTTO STAMMANN.
I. WOLFFSON.

54 Deposition of Johann Otto Stamman, taken on written interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on August 23, 1893.

My name is Johann Otto Stamman. I am fifty-seven years old, and am at present a Hamburg senator; but formerly an attorney-at-law. I practiced the legal profession from 1858 to 1886 at Hamburg. I hold the degrees of doctor of Roman and canonic law

since 1857. I am familiar with the law as administered in Hamburg in 1885, respecting bottomry and respondentia bonds.

I remember that subsequent to February, 1885, I was requested by Mr. Hugo Wirtz, as agent of Messrs. Anthony Gibbs & Co., of London, to give, in conjunction with Dr. I. Wolffson, an attorney-at-law in Hamburg, who had been requested by Messrs. J. Berenberg, Godsler & Co., agents of Baring Bros., in London, to give an arbitration regarding the liability of the cargo of the *Mary J. Leslie*, for the amount of a certain bottomry bond which was submitted to us, and I do not doubt but that the annexed bottomry bond is identical with the one then submitted to us. The arbitration as requested was given. I do not remember whether the loss of the *Andrew Johnson* was made known to me, as this was not relevant to the contents of our judgment. I do not remember whether I have ever seen the annexed bill of lading (same is annexed to the amended libel), not having been necessary for the giving of the opinion or judgment.

I have no copy of the arbitration given by us, but I have examined a document presented by one of the witnesses and purporting to be a translation of the judgment, and I am convinced that it is in every respect correct. The judgment or opinion it con-
55 tains was, or is, in accord with Hamburg law as administered therein. The General German Commercial Code, articles 504, 507, 634, section 2; 681, 692, 695, 649 are pertinent statutes.

(A translation of the articles specified by the witness is appended.)

I know nothing further material to the issues, and of advantage to the libellants, than that since I have been informed of the matter now at issue, I am of opinion that according to article 778, section 2, of the General German Commercial Code which governs in Hamburg, the decision ought to be in favor of the plaintiff.

Cross-examination:

I have a good knowledge of the English language and am testifying in the same. I have examined the copy of the General German Commercial Code heretofore produced and find the same to be perfectly correct.

The law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void.

I have read the bottomry and respondentia bond and also the paper dated Hamburg, March 14, 1885, and addressed to Hugo Wirtz, and I concur in the views expressed in the last-named paper.

56 *Translation of the Articles of the General German Commercial Code Cited by the Witnesses and of the Articles Referred to Therein.*

Seventh part.

Concerning Bottomry.

Art. 680. Bottomry, in the sense of this code, is a loan transaction concluded by the master as such, by virtue of the rights granted to him in this code, under promise of a premium and under hypothecation of ship, freight and cargo, or of one or more of these objects, in such a manner that the creditor can enforce his claims only to the extent of the hypothecated (bottomried) objects after the arrival of the vessel at the place where the voyage for which the transaction has been concluded shall terminate (bottomry voyage).

Art. 681. Bottomry transactions may only be concluded by the master in the following cases: (1) While the vessel is away from the port of registry, for the purpose of completing the voyage in conformity with articles 497, 507, 509 and 511; (2) during the voyage in the sole interests of the parties concerned in the cargo, for the purpose of preserving and forwarding the same in conformity with articles 504, 511 and 634. In the case of No. 2 the master may take the bottomry on the cargo alone; in all other cases he may take bottomry for the ship or the freight alone; but for the cargo only together with ship and freight.

When a bottomry bond is given on the ship without naming the freight, the latter is not considered as included. When, however, a bottomry bond on ship and cargo is given, freight is considered to be included in the same. A bottomry bond on the freight is admissible as long as the latter is exposed to any sea risk. A
57 bottomry bond can likewise be given for the freight, of that part of the voyage which has not yet been commenced.

Art. 682. The amount of the bottomry premium may, without any restriction, be agreed upon by the contracting parties.

In default of an agreement to the contrary, the premium includes the interest likewise.

Art. 683. A bottomry bond shall be executed by the master concerning the bottomry transaction. Should this not have been done, the creditor has the same rights as he would have if the master had entered into a simple credit transaction for the purpose of supplying any of his requirements.

Art. 684. The bottomry lender can demand that the bottomry shall contain—

(1.) The name of the bottomry creditor.

(2.) The amount of the principal of the bottomry debt.

(3.) The amount of the bottomry premium, or the total amount of the sum payable to the creditor.

(4.) The description of the objects hypothecated by the bond.

(5.) The description of the vessel and the master.

(6.) The bottomry voyage.

(7.) The time at which the bottomry debt shall be paid.

(8.) The place where the payment shall be made.

(9.) The designation of the document as bottomry bond, embodied in the document itself, or the declaration that the debt has been contracted as a bottomry debt, or any other declaration sufficiently showing the transaction to be of the nature of bottomry.

(10.) The circumstances which have necessitated the entering into the bottomry transaction.

58 (11.) The date and place where the document has been executed.

(12.) The signature of the master.

Art. 685. Unless the contrary has been agreed upon, the bottomry bond shall, at the demand of the bottomry lender, be executed to the order of the creditor or simply to order. In the latter case the word "order" signifies the order of the bottomry lender.

Art. 686. When the necessity of concluding the transaction has been established previous to the execution of the bottomry bond by a document of the consul of the country, or from the consul authorized to act for the same, or in default of such consul from any court of law or any other competent authority of the place of execution, or, in case neither of these exist, from the officers of the vessel, it shall be considered that the master has been duly authorized to conclude the transaction to the extent in question.

Evidence to the contrary, however, shall be admissible.

Art. 687. The bottomry lender can demand the execution of several copies of the bottomry bond. Should several copies have been issued, the number of such copies has to be stated in each of them.

The bottomry bond is transferable by endorsement, if it has been made out to order. The plea that the master had not been authorized to enter into the transaction at all, or to the extent in question, is admissible also against the holder by endorsement.

Art. 688. Unless an agreement to the contrary has been made in the bottomry bond itself, the bottomry debt is payable at the port of destination of the bottomry voyage and on the eighth day after the arrival of the vessel in that port. From the day when

59 it falls due mercantile interest becomes payable upon the whole bottomry debt, including the premium. The foregoing provision does not apply when the premium has been stipulated by time; the time premium runs, however, until the payment of the principal of the bottomry debt has been effected.

Art. 689. The payment of the bottomry debt when due cannot be refused to the legal holder of even one copy of the bottomry bond. Such payment can only be demanded on return of such copy, on which the customary receipt for the payment is to be attached.

Art. 690. In case several legal holders of any bottomry bond apply for payment, such payment shall be refused; the amount shall, in case it is required to obtain possession of the bottomried objects, be deposited with a court of law, or in any other safe manner; and those holders of any bottomry bond who have applied shall be informed of the course taken and of the reasons for the same.

Should such amount not have been deposited with a court of law, the depositor may cause a public document to be issued respecting his proceedings, and his reasons for the same, and he may deduct the expenses thereby occasioned from the bottomry debt.

Art. 691. The bottomry creditor is not liable to contribute to general or particular average. In case, however, the bottomried objects become, by reason of general or particular average, insufficient for the payment of the bottomry creditor, he shall bear the loss thereby caused.

Art. 692. All the bottomried objects are jointly and severally liable to the bottomry creditor. After the arrival of the vessel at the port of destination of the bottomry voyage, the creditor can
60 apply for an arrest of all bottomried objects even before his claim becomes due.

Art. 693. The master shall care for the safe keeping and preservation of the bottomried objects; he shall not, without urgent reason, commit any act whereby the risk of the bottomry creditor is increased or altered from what he might anticipate when entering into the contract.

If he acts contrary to these provisions he is answerable to the bottomry creditor for the damage thereby arising (art. 479).

Art. 694. When the master has arbitrarily changed the bottomry voyage, or when he has arbitrarily deviated from the proper course, or when, after its termination, he has again exposed the bottomried objects to sea risks without having been compelled to do so in the interests of the creditor, the master is personally answerable to the creditor for the bottomry debt, so far as the latter does not receive his payment out of the bottomried objects unless he proves that the non-payment has not been caused through the change of voyage or through the deviation or through the new sea risk.

Art. 695. The master shall not deliver the bottomried cargo, either entirely or partially before the creditor has been paid or properly secured, otherwise the master is personally answerable to the creditor for the bottomry debt so far as he could, at the time of this delivery, have been paid by the goods so given up.

Until the contrary has been proved it shall be considered that the creditor could have been paid in full.

Art. 696. When in the cases of articles 693, 694, 695, the master has acted by directions from the ship-owner, the provisions of the second and third sections of article 479 shall apply.

61 Art. 697. If the amount of bottomry is not paid when due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken and also to hand over the bottomried freight.

The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery against the master; after its delivery, against the consignee, so long as it is in his own possession, or in the custody of any person holding it for his account.

The creditor can make no use of his rights to the prejudice of a

third party who has *bona fide* become possessor of the bottomried cargo.

Art. 698. The consignee, to whom it is known on taking any bottomried goods, that they are liable for a bottomry debt, becomes personally answerable to the creditor for the debt to the extent of the value which the goods had at the time of their delivery, so far as the creditor could have been paid out of the goods if the delivery had not taken place.

Art. 699. When the adventure is given up before the commencement of the bottomry voyage, the creditor may demand immediate payment of the bottomry debt at the place at which such bottomry bond has been taken. He must, however, be satisfied with a proportionate reduction of the premium; in fixing such reduction the proportion of the danger sustained to that undertaken shall be principally considered. When the bottomry voyage does not terminate in the port of destination, but in another port, the bottomry debt must be paid in the latter port without deduction from the premium, after the expiration of the stipulated time for payment or, in default of an agreement, after the expiration of eight days (art. 688). Such time of payment to be calculated from the definite abandonment.

62 The articles 689–698 apply likewise to the foregoing cases where the contrary is not enacted by this article.

Art. 700. The application of the provisions of this part is not affected by the master being part owner or sole owner of the vessel or of the cargo, or of both of them, or by his having entered into the bottomry transaction upon special instructions from the parties concerned.

Art. 701. It is reserved to the legislation of the various countries to introduce regulations respecting irregular bottomry transactions, *i. e.*, such as may not have been entered into by the master as such in the cases contemplated by article 681.

Art. 479. This liability of the master exists not only towards the owner, but also towards the charterer, shipper and receiver of cargo, the passengers, crew and those creditors of the vessels whose claims arise out of a credit transaction (art. 497), more especially the bottomry creditor.

The master is not exonerated from liability as regards the other before-mentioned persons by having acted according to instructions of the owner. By such instruction the owner becomes also personally liable if he was acquainted with the position of affairs at the time the instruction was given.

Art. 497. The master is, however, only entitled to contract loans, to make purchases on credit and to conclude similar transactions on credit when they are necessary for the maintenance of the vessel and the completion of the voyage, and only so far as is necessary to supply the actual requirement. He is only at liberty to

63 enter into a bottomry transaction when it is unavoidably requisite for the completion of the voyage, and only so far as is necessary to supply the actual requirement. The validity of the transaction depends neither upon the actual application of the

money, nor upon the prudence of the selection made between various modes of raising money, nor upon the question whether the master had at his disposal the money required, except it should be proved that the third party acted in bad faith.

Art. 504. The master shall take every possible care of the cargo during the voyage in the interest of those concerned therein.

When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interest of those concerned in the cargo as their representative; to take their instructions, if possible, and so far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences and of the measures thereby rendered necessary.

He is particularly in such cases authorized to discharge the whole or a portion of the cargo in extreme cases, if on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation or further transport; or to reclaim it in case of capture or detention; or, if it shall have been otherwise withdrawn from his charge, to take all extrajudicial and judicial steps for its recovery.

Art. 507. With the exception of the cases stated in art. 504, the master has only the right to hypothecate the cargo, or to dis-
64 pose of portions thereof by sale or conversion, when and in so far as it is necessary for the purpose of prosecuting the voyage.

Art. 508. If the necessity orig-nates in a general average, and if the master has an option of remedies, he shall take that determination which entails the least detriment to the parties interested.

Art. 509. When the case is not one of a general average, the master shall not take a bottomry bond on the cargo, or dispose of portions of the same by sale or conversion unless he cannot provide for his requirements in any other way, or unless the adoption of other measures would cause a disproportionate damage to the owner.

In such cases also he can only hypothecate or take a bottomry bond on the cargo together with ship and freight (art. 681, par. 2). He shall resolve upon taking a bottomry bond in preference to sale, unless a disproportionate damage would be caused thereby to the owner.

Art. 511. The enactments of art. 497 are to be applied with respect to the validity of legal transactions entered into by the master in the cases contemplated by articles 504 and 507–509.

Art. 634. The dissolution of the contract of affreight alters nothing in the obligation of the master to take care of the cargo in the absence of the parties interested, even after the loss of the vessel. The master is, therefore, justified and obliged, and in urgent cases even without previous inquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored, or sold, and

in case of its being forwarded or stored, to sell a portion
65 thereof for the purpose of realizing the funds necessary thereto, and to its preservation; or in case of its being forwarded to take a bottomry bond on the whole or part — it.

The master is, however, not obliged to part with the cargo, or to deliver it to another master for the purpose of its being forwarded, unless the distance freight as well as all other claims of the ship-owner, and the contributions due from the cargo for general average, salvage and assistance, and bottomry, have been paid or secured.

The ship-owner is responsible for the fulfilment of the duties devolving upon the master according to the first section of this article, to the extent of the value of the ship, so far as anything has been saved of it, and of the freight.

Art. 778. In cases of general average, the compensation for sacrifice or damage takes, as against the ship's creditor, the place of that which the compensation is to make good.

The same rule applies to the indemnity, which in case of loss or damage to the vessel or of non-payment of freight when goods have been lost or damaged, is due to the ship-owner by the party who has caused the damage by his illegal conduct.

When the compensation or indemnity has been received by the ship-owner, he is personally responsible to the ship's creditors to the extent of the amount received in the same manner as to the creditors of a voyage in case of encashment of the freight.

66 Deposition of Captain James Hovey Killeran, taken before a notary public in and for the county of Erie, in the State of New York, on behalf of the libellants in the above-entitled cause, on the 23d day of March, 1893, and read by the respondent.

James Hovey Killeran, being duly sworn, and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Q. Where do you live?

A. In Buffalo.

Q. What is your full name?

A. James Hovey Killeran.

Q. Were you in 1884 the master of the *Andrew Johnson* at the time she loaded her cargo of nitrates at Iquique and Caleta Buena?

A. Yes.

Q. Were you also her captain at the time she sought Callao as a port of refuge?

A. Yes.

Q. Were you also her captain when she was lost through collision with the *Thirlmere*?

A. Yes.

Q. What was, in your opinion, the value of the vessel at the time of her loss?

A. About twelve thousand pounds sterling.

Q. And in your opinion what was her value at the time she entered the harbor of Callao, her port of refuge, before making repairs?

A. In my opinion the ship was worth just as much when she entered the port of Callao as she was at the time of the collision. Most of our expense was incurred in transshipping cargo, and the repairs made at Callao were not of a permanent nature.

Q. Were you examined in this cause before?

A. Yes, in August, 1892, in New York city.

67 United States District Court, Southern District of New York.

BRICE ALLAN MILLER *et al.*
vs.
EDWARD E. O'BRIEN.

Butler, Stillman & Hubbard (Wm. Mynderse) for libellants.
Sidney Chubb for respondent.

This was a libel against the respondent *in personam* to recover moneys which the libellants paid in Germany to redeem their cargo from a bottomry bond executed by the master of the American ship *Andrew Johnson* at Callao, Peru, on September 15, 1884.

The libel avers that the libellants in June and July, 1884, shipped on board said vessel at Iquique bay and at Caleta Buena about 20,000 bags of nitrate of soda, to be transported to Hamburg, Germany; that she sailed from the latter port for Hamburg on July 15 in an unseaworthy condition; that thereafter she began to leak badly, and in distress put into Callao, Peru, on August 4th; that she was obliged for safety to transship 1,200 tons of her cargo on board the British bark *Mary J. Leslie*, to be carried to Hamburg, and that for repairs and transshipment she necessarily incurred an expense of £2,215 5s. 9d., British sterling, which the master was obliged to obtain on bottomry of the ship, freight and cargo, including the 1,200 tons shipped on the *Leslie*; for which sum the master legally executed a bottomry bond to Messrs. Grace Brothers & Co., merchants of Lima, with maritime interest at the rate of 17½
68 per cent., making in all £2,599 8s. 9d.; that the *Leslie* arrived at Hamburg safely, but that the ship *Andrew Johnson* became a total loss on the voyage from Callao; and that the libellants in order to obtain possession of the 1,200 tons of cargo belonging to them were obliged, on March 17, 1885, to pay the whole amount of said bottomry and respondentia bond, and that £1,617 4s. 3d. ($7,870.16) thereof were charges specifically made and incurred by and for the benefit of the said ship *Andrew Johnson* and her freight and the owner thereof; and that demand of the last-named sum had been made upon the respondent and payment refused.

The respondent excepted to the libel (1) in that it does not state the nature of the action; and (2) that it does not show a cause of action against the respondent.

BROWN, *J.*:

The nature of the cause, I think, sufficiently appears in the libel to answer the requirement of the 23d rule in admiralty.

The second exception that no cause of action is stated, goes to the merits of the action. It does not cover any mere informality of statement nor any lack of fullness in detail, or of definiteness and certainty. The objection that there is no averment in the libel that communication was had with the owners of the cargo before executing the bottomry, cannot, therefore, be considered. The general averments that the expense incurred was necessary; that the execution of bottomry was necessary; and that the master "lawfully executed" the bottomry are, I think, sufficient, except on special demurrer or special exception.

The general question presented is whether upon a total loss of the *Andrew Johnson* and her cargo and freight the ship-owner is bound to indemnify the owner of the 1,200 tons of cargo that arrived safely by the *Leslie* for what he paid on the bottomry bond to obtain his goods, so far as the bottomry loan was originally incurred for the benefit of the lost ship and freight. 69

The amount claimed in the libel being only £1,617 4s. 3d. ($7,870.16), it is to be inferred that the residue of nearly £1,000 was the amount of the expense included in the bottomry loan that was apportioned against the cargo, while the former sum was charged against the particular average of the *Andrew Johnson* and her freight to be earned.

Through the total loss of the *Andrew Johnson* and of that part of the cargo that remained on board of her the respondent has already lost everything that he embarked in the adventure.

Upon the general question two points have been discussed by counsel; first, whether under the peculiar terms of the bottomry bond the *Leslie* part of the cargo was upon the utter loss of the other ship chargeable with any lien, and whether consequently the libellants were legally bound to pay anything to obtain possession of the *Leslie's* cargo; second, whether, if they were thus bound, there was any legal right of recourse against the owner of the *Andrew Johnson*, who had suffered a total loss of his own ship and freight.

In the recent case of Force *v.* Providence, &c., Insurance Company (35 Fed. Rep., 767), some consideration was given to the different provisions of bottomry instruments in regard to the risks assumed by the lender and his right to salvage in what might remain after a total loss of the ship. In that case the bottomry instrument was a brief and informal draft; the present is a full and formal instrument of some 15 folios. The construction of the instrument itself is not free from difficulty. It is executed by James H. Killeran, as master of the ship *Andrew Johnson*. It recites in detail the principal facts and continues: "That Grace Brothers & Co. were contented to stand to and bear the risk, hazard and adventure of said advances upon the hull, body or keel of the said vessel *Andrew Johnson*, together with the cargo laden on board as afore-

said, and the freight to be earned—and that the said master
70 doth hypothecate and charge the said vessel and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of said voyage, upon condition that if the said vessel shall forthwith set sail from Callao—and if the above bounden, James H. Killeran, shall within the next five days after the arrival of the vessel at her final port of destination, and before commencing to discharge, pay to Grace Brothers & Co. the said advances, and the maritime premiums thereon—or, if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea, or navigation, or any other casualty, shall unavoidably happen, to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue."

The libellants contend that the words "the said vessel" in the condition of the bond apply equally to both the *Andrew Johnson* and the *Mary J. Leslie*. No doubt it was the expectation of the parties that both vessels alike would sail forthwith from Callao, and deliver their cargoes, but the context scarcely admits of any literal application of the conditions to both vessels alike. It could not have been intended that "the above bounden, James H. Killeran," master of the *Andrew Johnson*, should "within five days after the arrival" of the *Leslie* pay the amount of the bond, if his own vessel arrived safely, though more than five days later, at the same port. On the other hand, it is clear that the cargo transshipped to the *Leslie* was intended to be included in the bottomry.

The final clause declares that in case of an utter loss by perils of the sea the obligation is to be void. There is no saving clause reserving to the lenders in case of such loss "any average that might be secured upon all salvage recoverable" as is usual in such full and formal instruments (Ins. Co. *v.* Gossler, 96 U. S., 645, 646).
71 If such an instrument were construed upon the principles of the common law strictly, and if "the said vessel" were held to mean the *Andrew Johnson* only, the whole instrument would become inoperative on the utter loss of that vessel under the condition that the obligation should in that event be void. Considering, however, that this is a maritime instrument to be constructed liberally in favor of the bottomry lender in support of its apparent or reasonable intention, and having regard to the provisions of nearly all the maritime codes, which gives the lender a right in the salvage though the vessel be lost, irrespective of the special phraseology of the instrument, I think that the obligation "that by the condition is to become void" may be fairly construed as intended to mean only the personal obligation or agreement to pay the loan; leaving the pledge operative upon any salvage recoverable, in the same manner as where the saving clause is embodied in the instrument (Force *v.* Providence Wash. Ins. Co., *supra*).

If the above construction is correct, it would not be material that the words "said vessel" in the preceding paragraph literally meant the *Andrew Johnson* only; for the cargo which was brought safely

by the *Leslie* was a part of the original cargo of the *Andrew Johnson* and being hypothecated by the bottomry instrument, that part of the cargo would continue subject to the bottomry lien, like any salvage from the wreck of the *Johnson*, precisely as if it had been rescued by the *Leslie* from the *Johnson* a few moments before the latter went down in mid-ocean.

Assuming, therefore, that as the libel states "the libellants were bound in law to pay the bond in order to obtain their goods" though the libel does not state that the payment was made under the compulsion of any legal proceedings, the case of Duncan *v.* Benson (1 Exch., 537, 3 Exch., 644), is cited as a direct adjudication that the ship-owner is bound to indemnify the libellants as for money paid for his account. In that case, the ship arrived
72 with her cargo, the owner abandoned the ship and freight, and refused to satisfy the bottomry; he was, nevertheless held liable to indemnify the cargo-owner. In Lloyd *v.* Guibert (L. R., 1 Q. B., 115), on the other hand, under precisely similar circumstance the ship-owner was held not liable; because by the law of France, to which country the ship belonged, the ship-owner was absolved from all liability by abandonment of the ship and freight. By the law of England the ship-owner has no similar right to free himself from liability for the master's engagements by abandonment and in the former case, therefore, the owner was held responsible, as for moneys in effect borrowed by the master from the cargo-owner for the purpose of repairing his ship; precisely as if he had sold a part of the cargo for the same purpose, in which case the owner's liability was not disputed.

Directly contrary to the case of Duncan *v.* Benson was the decision of Taney, Ch. J., in the case of Naylor *v.* Baltzell (Taney's, 55), in which the owner of bottomried cargo, which had been sold in the enforcement of the bottomry bond, sued the owner of an American vessel for non-delivery of his cargo. The question of the extent of the ship-owner's liability was then fully considered and held to be limited to the value of the ship and freight that comes to the ship-owner's hands, was held that the master had no authority to bind the owner beyond that limit; and that he could not by a pledge of the cargo indirectly extend the ship-owner's personal responsibility. "The justice and sound policy," says Taney, chief justice, "of the rule which restricts the power of the master over the property and fortune of his owner, to the value of the ship intrusted to his command and the freight she may earn, is proved by its adoption by every commercial nation in Europe; and we should be very unwilling to establish a contrary principle in this country, unless very clear and decisive authorities compelled us to the decision. For it would place the American ship-owner in a far worse
73 condition than his European rival, and compel him to hazard his whole fortune, however large, upon every distant voyage made by one of his ships."

Since that decision was rendered, the act of 1851 (Rev. Stat. § 4283), applicable to at least all cases of loss and damage, and the recent act of June 26, 1884 (23 St. at L., p. 57, ch. 12, § 18), extend-

ing the same exemption to all debts and liabilities generally, save for seamen's wages, have confirmed that adjudication. These acts were designed to bring the law of this country into harmony with the maritime law of most other countries in respect to the limitation of the liabilities of ship-owners arising from the navigation of their vessels and the acts of masters, whether growing out of contract or tort (Norwich Co. *v.* Wright, 13 Wall., 104, 119, 121).

It is immaterial which law be looked to as the law of the contract in this case, whether the law of this country as that of the ship's home, the law of Peru, where the contract was made; or that of Hamburg, where it was to be performed; since the law of all three on this point is now in substantial accord (2 Des Jardins Droit Com. Mar., §§ 280, 282; Force *vs.* Providence, *supra*). By neither is the ship-owner answerable after the utter loss of ship and freight, unless he is chargeable with some personal privity or fault; and that is not here alleged.

The exception to the libel on the merits is, therefore sustained.

June 6, 1888.

74 United States District Court, Southern District of New York.

BRICE ALLAN MILLER and Others, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

In admiralty—Bottomry bond.

Butler, Stillman & Hubbard and Mr. Mynderse, for libellants.
Sidney Chubb, for respondents.

BROWN, *J.*:

The above libel was filed against the respondent *in personam* as owner of the American ship *Andrew Johnson*, to recover £1,617 4s. 3d., the defendant's alleged *pro rata* share of certain moneys which the libellants were compelled to pay at Hamburg, Germany, in order to redeem their cargo from a bottomry bond executed by the master at Callao, Peru, on September 15, 1884.

Most of the facts are stated in the decision upon the argument of exceptions to the libel (35 Fed. Rep., 779). It was there held that the bond remained a valid bottomry lien upon the 1,200 tons of nitrates which had been transshipped from the *Andrew Johnson* to the *Mary J. Leslie*, and which reached safely the port of Hamburg, although the *Andrew Johnson*, to whose cargo all the nitrates had formerly belonged, was lost at sea by collision. The exceptions to
the libel were, however, sustained, on the ground that under
75 the acts limiting the liability of ship-owners, the defendant was not further responsible after the total loss of his vessel—her total loss being alleged in the libel. The loss of the *Andrew Johnson* resulted, however, from collision with the ship *Thirlmere*, through the fault of the latter vessel; and the respondent subsequently recovered from the owners of the *Thirlmere* in England

damages for the loss of the *Andrew Johnson* to the amount of £5,179 13s. 6d., and £858 6s. 11d., for loss of freight; the value of the ship having been fixed at £10,000. These facts were alleged in the amended libel and established by the evidence.

On the arrival of the *Leslie* at Hamburg, it was agreed between the representatives of the bottomry claimant and the owners of the cargo that in consideration of the delivery and release of the cargo from the bottomry, the owners of the cargo should pay "whatever proportion of the said bottomry and respondentia bond may be found to be legally due from the said cargo; the question to be submitted" to certain legal counsel as arbitrators; and the cargo was thereupon delivered. Its value was upwards of three times the whole amount of the bond; and the arbitrators having subsequently decided that the cargo was legally subject to the lien of the bond, the whole amount of the bond was paid by the libelants, the owners of the cargo. The bond was given for port of refuge expenses and advances at Callao. Upon an average adjustment afterwards made in London, the amount claimed in the libel was computed to be the *pro rata* amount of the advances chargeable upon the ship and freight; and the above libel was filed for the recovery thereof against the owners as moneys paid for their use.

(1.) On careful consideration of the further arguments made in behalf of the respondents, I am not persuaded of any error in the former decision, as to the proper construction of the bottomry
76 bond, or in the conclusion that the cargo that arrived at Hamburg on board of the *Leslie* was bound by the bond, notwithstanding the loss of the *Andrew Johnson*. Even if the *Andrew Johnson* had been an "utter loss," within the language of the bond, that portion of her cargo which had been transhipped on board the *Leslie*, and which arrived safely, was not lost; and that portion was specifically, and by name, hypothecated in the bottomry bond. It seems to me inconceivable that the parties should thus explicitly have embraced this part of the cargo in the bond without intending it to answer for the bottomry loan on safe arrival at Hamburg, even though the *Andrew Johnson* might perish. The ambiguous phraseology of the bond in using the term "the said vessel" should be so construed as to effectuate the obvious intention of the whole instrument, by making the words "the said vessel" include *both vessels*, *i. e.*, by interpreting the singular for the plural, if necessary, *ut res magis valeat quam pereat.*

Besides this, however, it is the general maritime rule, as I understand, that if there be any salvage, or any proceeds of any of the effects covered by bottomry, the bondholder's lien attaches thereto, though the ship be lost (McLaughlin on Shipping, 3d ed., p. 61; Force *vs.* Providence, 35 Fed. R., 767, 771, and authorities there cited). In full instruments of bottomry like the present an express clause to that effect is often, perhaps usually inserted. The Code of Spain (art. 734), like those of France, Italy and the Netherlands, provides that "in case of shipwreck the amount chargeable for the repayment of the loan on bottomry is reduced to the product of what is saved, less the expense of salvage." The South American

codes are mainly a reproduction of those of Spain; and that of Peru probably has a similar provision. There is no evidence before me on that point, nor have I that code at hand. But so general is this provision, and so wholly is it in accord with the nature and object of bottomry that I cannot help considering it, under the gen-
77 eral maritime law, to be virtually a part of the bond by implication, and not necessary to be expressly reserved in the bond. Such is the rule laid down by Emerigon, Cont. a la Grosse, ch. 11, sec. 2, and this seems to be approved as the general maritime rule in Insurance Co. *vs.* Gossler, 96 U. S., 645, 652, 653, 655, in which the court, per Clifford, justice, states the general law as follows:

"Where the bond covers the cargo as well as the vessel, the lender, *unless the condition is otherwise*, is entitled to be paid even if the ship is lost, if enough of the cargo arrives in safety to pay the bottomry loan; the rule being that a maritime lien of the lender attaches to the entire property covered by the bond, or to all that part of it which arrives at the port of destination in safety."

See Appleton *vs.* Crowningshield, 3 Mass., 464; 8 do., 340.

(2.) It now appears that the respondent has recovered upwards of $30,000 for the loss of the *Andrew Johnson* through the negligence of the *Thirlmere*. These proceeds in the respondent's hands stand as the direct product and representative of the ship; so that the *Andrew Johnson*, even if the words "the said vessel" be held to refer to her only, has not become an "utter loss" within the condition of the bond, or within the presumed intention of the parties. The limited-liability acts, for the same reason, are not available to the owner as a defense, because he must surrender those proceeds as a part of his "interest in the vessel" in order to become entitled to the limitation of liability. Such proceeds have no resemblance to insurance moneys recovered after such a loss; for insurance moneys are held not to stand as a substitute for the ship, because they arise out of an independent, personal contract for indemnity; a contract wholly collateral to the ship, and not constituting any interest in the ship (*City of Norwich*, 118 U.S., 468, 494; 6 Sup.Ct., 1150). The damages recovered for the negligent destruction of the ship
78 are precisely opposite. The right of property in the ship and the right to damages are identical; the latter is founded directly and exclusively upon the former, and is its necessary legal attendant.

That such damages are to be treated as a substitute for the ship, is a rule often applied in cases of mutual fault, upon a total loss of one of the vessels and her cargo. The vessel that survives is not required to pay the whole loss of the other's cargo in addition to one-half the value of the other vessel lost; but the sum recoverable by the latter is treated as a fund representing the lost ship, and as such chargeable with half the loss on her own cargo. This is enforced notwithstanding the fact that the statute makes "the interest of the owner *in the ship and pending freight*" at the *close of the voyage*, the limit of his liability. For his interest in the ship still remains

in the form of a demand against the other vessel for half damages, for which he must account. It is the same with a bottomry bond, for this conveys, in pledge, all the owner's interest in his ship, and under the bond and under the statute alike the transfer of his interest in the vessel includes, by necessary implication, the fund recoverable, as the representative of the ship, for her tortious destruction.

I find, therefore, that the bond was a legal lien upon that part of the cargo which arrived in Hamburg, and which was worth more than the amount of the bond. The libellants, having necessarily paid the bottomry loan in full, in order to obtain possession of the cargo, are entitled to be reimbursed so much, as upon a proper adjustment, was chargeable to the respondent as owner of the ship and freight. The rules of general average being somewhat different in this country from those of England, if the parties are dissatisfied with the adjustment made in London, a reference may be taken to ascertain the proper amount according to our law, there being
79 no evidence that any different law is applicable.

Decree accordingly, with costs.

New York, February 5, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 12th day of April, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

This cause having come on for hearing upon the depositions, proofs and arguments of the respective parties, it is now, after due consideration,

Ordered, adjudged and decreed by the court that Brice Alan Miller, Thomas Dennison Comber, John Manley Lowe, John Isdaile Smail and Alfred Nailor, libellants herein, recover against the respondent Edward E. O'Brien, so much of the moneys paid by them in satisfying the bottomry and respondentia bond referred to in the libel as upon a proper adjustment is properly chargeable to the said Edward E. O'Brien, as owner of the ship *Andrew Johnson*, and her freight; and it is further—

80 Ordered, that it be referred to William A. Walker, Esq., as special commissioner to ascertain and compute such amount as these libellants are entitled to recover as aforesaid, and that he report thereon to this court with all convenient speed.

ADDISON BROWN.

(Endorsed:) Interlocutory decree. Filed April 12, 1894.

United States District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

SIRS: Please take notice that upon the annexed affidavit, and upon all the papers and proceedings herein, I shall move this honorable court at a stated term thereof to be held at the United States court-rooms in the city of New York on Tuesday, the tenth day of April, 1894, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard for leave to amend the respondent's answer herein as set forth in said affidavit, and for such other and further and different relief in the premises as may be just.

Dated New York, April 6, 1894.

Yours, &c.,

SIDNEY CHUBB,
Proctor for Respondent.

To Messrs. Butler, Stillman & Hubbard, proctors for libellants.

81 U. S. District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*, Libellants,
ag'st
EDWARD E. O'BRIEN, Respondent.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Sidney Chubb, being duly sworn, deposes and says: That he is the proctor for the respondent herein.

That the original libel herein was filed in July, 1887, to which the respondent filed exceptions which were sustained after argument, with leave to the libellants to amend their libel; that the libellants filed an amended libel, to which the respondent filed exceptions, and subsequently and on January 4, 1889, a second amended libel, to which respondent also filed exceptions. That subsequently and on October 1, 1890, the libellants' proctors served on deponent a copy affidavit of Wilhelmus Mynderse, and a notice of motion for leave to amend the sixth article of their second amended libel, by setting up the recovery by the respondent in an English court of admiralty for damages for the loss of his ship *Andrew Johnson* against the ship *Thirlmere* and owners. That the said affidavit was verified on October 1, 1890, and contained this statement: "The information respecting the circumstances attending the loss of the *Andrew Johnson* first came to deponent in July, 1890."

82 That libellants' said motion came on to be heard on Tuesday, October 21, 1890, before the district judge, who, after hearing deponent in opposition thereto, granted the same, and on October 24th an order allowing the libellants to amend their libel as prayed was signed by him and entered.

That thereafter and on October 28, 1890, the libellants filed their

third amended libel, to which the respondent filed verified exceptions and an answer.

That prior to the trial of this cause upon the merits deponent served upon libellants' proctors a notice to produce, of which the following is a copy: "Please take notice that you are hereby required to produce upon the trial of this cause a certain letter from Messrs. Walton, Bubb & Johnson, solicitors, of London, England, to Messrs. Anthony Gibbs & Sons, of London, bearing date London, 14th December, 1885; also a certain letter from the said Walton, Bubb & Johnson to Messrs. Butler, Stillman & Hubbard, of New York, instructing said last-named firm to bring suit in the United States for the claim set up in the libels herein."

That the libellants' advocate, Mr. Mynderse, before the trial showed deponent the second letter called for in the foregoing notice to produce, from which the following is an extract:

"They now claim under Benson *v.* Duncan, 18 Law Journal, Exchequer 169, that owner of the *Andrew Johnson* shall repay to them such part of the amount of the bond as was composed of charges properly falling on ship," &c., &c.

Mr. Mynderse also then stated to deponent that he did not have (or did not find among his papers) any paper answering the description of the letter first called for in said notice to produce.

That hereto annexed and marked Exhibit A is a true copy of said letter.

That when this cause was called for trial before the district judge on November 22, 1893, the libellants' advocate opened by
83 making a statement of the allegations of the libel, whereupon deponent read from the exceptions and answer filed by the respondent the exceptions therein contained, and the district judge overruled the first and third of said exceptions, and reserved the second of said exceptions until the whole evidence should be submitted, to which rulings deponent then excepted, and thereupon deponent moved for leave to amend the respondent's answer by setting up two separate and additional defenses—first, as to so much of the libellants' claim as arises out of the limited liability proceedings in the English court as to the *Thirlmere*, the defense of laches on the part of the libellants in not sooner bringing that matter before this court; second, as to the same portion of their claim, the claim of *res adjudicata* because passed on by the English court. The court thereupon denied each of said motions, and deponent excepted thereto.

That the deponent's object in serving the aforesaid notice to produce was to offer the letters therein described as evidence in support of the said two additional defenses proposed to be set up by him, and the stenographer's minutes of the trial contain the following:

"The COURT: I overrule the motion to amend as to *res adjudicata*, there having been no notice of any such motion."

That the reason why deponent did not set up in the respondent's answer to said third amended libel said additional defense was that

deponent was then of the opinion that his client was entitled to judgment on the defenses then set up, and that deponent was then advised that the presentation and rejection by the English admiralty court of the libellants' claim, founded on their payment of the bottomry bond, did not, according to the law of England, amount to an adjudication thereon, for the reason that the said English court of admiralty was without jurisdiction thereof; that deponent is now advised that the said admiralty court had in
84 fact jurisdiction of libellants' said claim. Moreover, it appears from testimony taken herein by the libellants, subsequent to the filing of respondent's said answer and exceptions, that the respondent had insurance on said ship and would have been entitled to receive from his underwriters half of whatever decree the libellants may be entitled to herein, had the same been secured with reasonable diligence, but that respondent has now lost said recourse by reason of the bar of the statute of limitations.

Wherefore, deponent prays leave to amend the said exceptions and answer of the respondent by setting up the aforesaid two additional defenses of laches on the part of the libellants and of *res adjudicata*.

SIDNEY CHUBB.

Sworn to before me this 6th day of April, 1894.

SAM'L BLATCHFORD,

[SEAL.] *A Commissioner of the United States Circuit Court for the Southern District of New York.*

EXHIBIT A.

LONDON, 14 *Dec'r*, 1885.

Andrew Johnson.

DEAR SIRS: The position of this matter is as follows: In consequence of the amount borrowed on bottomry not having been apportioned between the cargo remaining on board the *Andrew Johnson* and the cargo transhipped to the *Mary C. Leslie*, each of these portions of cargo became charged with the whole amount of the bond as between the owners of cargo and the bondholders, and accordingly, although the *Andrew Johnson* was lost, the bondholders recovered payment of the whole amount of their bond from the portion of cargo on board the *Mary J. Leslie* which arrived.
85 The advance on bottomry was not very judiciously arranged in this respect or this result would not have ensued.

It would have been easy and far preferable to have made some rough apportionment of the amount borrowed between the *Andrew Johnson* and the cargo remaining on board her, and the cargo transshipped to the *Mary J. Leslie*, and to have given separate bonds for the proportions attaching to each, such a course would not have complicated matters with the underwriters in any way as they had no concern with bonds, but only with the items of the

expenditure to meet which the bond was given. So far as to the position with regard to the bond.

Next as to the collision. The *Andrew Johnson* was you are aware was run down by the *Thirlmere*, which vessel was held to blame for the collision, and paid into court to answer all claims the sum of £13,685–7–2, which amount had to be divided by the court among the parties who had suffered loss by the collision.

Now, in one sense the only loss suffered by you as the owners of the cargo on board the *Andrew Johnson*, and *prima facie* you were entitled to claim by that loss, and for nothing else, and the ship-owner entitled to claim for the value of the vessel, but owing to the form of the bond the loss of the *Andrew Johnson* caused the whole amount of bond to fall upon the cargo per *Mary J. Leslie*, and therefore the indirect result of the collision was not only that you lost the cargo on board the *Andrew Johnson*, but also that the cargo on board the *Mary J. Leslie*, a sum of money which would not have fallen upon it if the *Andrew Johnson* had safely arrived. If the *Andrew Johnson* had arrived, the ship and freight would have been liable in the first instance for the bond and the cargo would only have had to contribute its share of general average and charges, the ship-owners bearing the whole of the charges incurred for the ship and the ship's share of general average. Indirectly, there-
86 fore, you sustained a much larger loss by the collision, while on the other hand the ship-owner escaped liability to pay his share of the bottomry bond, which would have become due from him if his vessel had arrived. Accordingly, it is obviously unfair that the amount paid into court by the *Thirlmere* should be divided between the owners of the *Andrew Johnson* and yourselves simply in proportion to the value of the *Andrew Johnson* and of the cargo on board her, for the value of the vessel depended to a great extent on the repairs which had been done to her, the cost of these repairs were included in the bottomry bond which had really been paid by you, and not by the ship. Accordingly, although the point was a very novel one, we contended before the registrar and merchants of the admiralty court, that the fund ought to be distributed equitably—that is to say, that the ship's share of the bottomry bond which you had been obliged to pay out of the cargo of the *Mary J. Leslie* by reason of the loss of the *Andrew Johnson*, and which the ship-owner had thus been saved from paying, should be deducted from the ship's claim and added to your own. We did not entertain any very great hope that we should succeed in this contention, because as against the owners of the *Thirlmere* who had nothing whatever to do with the bond, the only direct loss from the collision for which they were liable was the loss of the vessel and the loss of the cargo on board her.

Accordingly, we were not surprised that the registrar & merchants reported against the claim and simply allow you to participate in the fund in court in proportion to the value of the cargo on board the *Andrew Johnson*, giving the ship-owner the benefit in the increased value of his vessel, of the repairs which he had not, but you had paid for. There is a right of appeal from this decision,

but, although all the equity of the matter is in favor of our contention, we think it extremely doubtful whether the decision would be reversed as matter of law and we do not see our way to advise you to appeal.

87 The figures as they at present stand are as follows: The claim of the *Andrew Johnson* and of her master and crew has been allowed at £8,862—your claim for cargo on board at £10,000. The amount in court, including interest, is about £14,000, and this sum will be divided between you and the owners of the *Andrew Johnson* in proportion to these figures.

There remains the question as to your claim against your underwriters on the cargo. For the reason already explained, you have to pay in respect of the *Mary J. Leslie* cargo, the whole of the bond, which includes a large amount particular average on ship and of special charges on ship, it also includes ship's contributions to general average. All these charges the ship-owner has escaped by the loss of his vessel. You therefore have been compelled to pay under the bond an amount for which apart from the bond, cargo would not have been liable.

It is clear law, established by a number of decisions, that in such circumstances you can recover nothing from the underwriters of cargo in respect of the excess or extra liability thus thrown on cargo, in other words you can recover no more than if the vessel and cargo had safely arrived and the bond had been paid off by the ship-owner. In that case cargo would have had to pay only its proper proportion of general average, &c., and your claim on the policies will, therefore, be confined to the insured value of the cargo on board the *Andrew Johnson* less the amount which you will receive out of court in the collision cause and to so much of the disbursement account for which the bond was given as would in the ordinary way be apportioned to the cargo; to the amount so apportioned you are probably entitled to add the bottomry premiums on that amount.

We should strongly advise that in future cases of the sort when cargo comes on by more than one vessel, the amount borrowed should be apportioned as we have suggested and secured by two distinct bonds, or at all events that the bond should not be

88 so worded as that the arrival of either vessel gives a right to the whole amount even if the other vessel is lost, this would be to your benefit, but it would not alter your position with your underwriters on cargo.

We should add that for the amount which you have had to pay under the bond in excess of cargo's true share of the average expenses, you have a right of action against the owner of the *Andrew Johnson*, such at least would be the case by our law and we believe that the law of the States is the same.

Yours truly,

(Signed) WALTONS, BUBB & JOHNSON.

Messrs. Anthony Gibbs & Sons, Bishopsgate street, E. C.

(Endorsed:) Affidavit & notice of motion. Filed April 12, 1894.

At a special term of the district court of the United States for the southern district of New York, held at the U. S. court-rooms in the city of New York, on the 10th day of April, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER *et al.*, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

A motion made by the respondent upon the affidavit of Sidney Chubb, verified on the sixth day of April, 1894, and upon
89 all the papers and proceedings herein, for leave to amend his answer to the third amended libel, by setting up the two additional defenses set forth in said affidavit, having come on to be heard, now, on reading and filing the said affidavit of Sidney Chubb, with the Exhibit A thereto annexed, and after hearing Sidney Chubb, Esq., advocate for the respondent in support of said motion, and Wilhelmus Mynderse, Esq., advocate for the libellants in opposition thereto, and due deliberation being had in the premises, it is

Ordered, that the said motion be, and it hereby is in all things denied.

ADDISON BROWN.

(Endorsed:) Order. Filed April 19, 1894.

U. S. District Court, Southern District of New York.

BRICE ALAN MILLER
vs.
EDWARD E. O'BRIEN.

The report made by William A. Walker as commissioner herein, is not to be printed or copied, but is to be transmitted to the circuit court of appeals, and is to be used there upon the argument of the appeal herein in its present shape, so far as either party to the appeal desires to refer to same.

New York, August 17, 1894.

BUTLER, STILLMAN & HUBBARD,
For Libellants.
GEO. A. BLACK, *Proc. Resp't.*

90 District Court of the United States for the Southern District of New York.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

Exceptions Filed by the Libellants to the Report of Commissioner.

The libellants except as follows to the report of William A. Walker, to whom reference was made to assess the amount due to the libellants.

I. The commissioner should have considered the question of interest, and should have reported that the libellants are entitled to interest upon the principal amount due them from the date of payment of the bond, to wit: March 17, 1885.

II. The commissioner should not have included among the general average charges his fees and disbursements for hearing the proofs and making his adjustment and report, but the same, being payable by the libellants, should be treated as a taxable disbursement against the respondent.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

(Endorsed:) Libellants' exceptions to commissioner's report. Filed June 8, 1894.

91 At a stated term of the district court of the United States, held at the United States court-rooms in the city of New York, on the 12th day of July, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

The commissioner to whom reference was made to ascertain and compute the amount that the libellants Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, are entitled to recover from the respondent Edward E. O'Brien, having made his report and exceptions having been filed to said report, which exceptions have been argued by counsel for the respective parties, it is now, due consideration having been had,

Ordered, adjudged and decreed by the court that Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, libellants herein, recover against the respondent Edward E. O'Brien, the sum of $6,091.73 with interest thereon, from the 2d day of April, 1886, in the sum of $3,025.56, and their costs as taxed at the sum of $481.65, amounting in all to the sum of $9,598.94, and that the said libellants have judgment therefor against the said respondent; and it is further—

92 Ordered, adjudged and decreed that unless an appeal be taken from this decree and security be given within the time and according to the practice of this court, then that William R. Grace and William M. Ivins, the stipulators for value upon the bond given by the respondent herein, cause the engagements of their stipulation to be performed and satisfied, or show cause within four days after the expiration of said time why judgment should not be entered against them in the amount of their stipulation, and why execution should not issue thereon; and it appearing that the libellants Henry Hucks Gibbs, Augustus Sillen, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs have no interest in said recovery, it is hereby—

Ordered that this action be as to them discontinued, without costs.

ADDISON BROWN.

(Endorsed:) Decree. Filed July 16, 1894.

U. S. District Court, Southern District of New York.

BRICE ALAN MILLER and Others
vs.
EDWARD E. O'BRIEN.

Please take notice that the respondent Edward E. O'Brien appeals to the United States circuit court of appeals for the second
93 circuit from the final decree entered herein on the twelfth day of July, 1894.

Dated July 16, 1894.

GEORGE A. BLACK,
Proctor for Respondent.

To Messrs. Butler, Stillman & Hubbard, proctors for libellant-Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed July 17, 1894.

U. S. Circuit Court of Appeals.

BRICE A. MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

Appellants' Assignments of Error.

1. The district court erred in giving a decree in favor of libellants.

2. The district court erred in not dismissing the libel.

3. The district court erred in allowing interest to libellants.

4. The district court erred in not holding that the libel-
94 lants were barred by the decision of the English admiralty court in the limitation of liability proceedings of the owners of the ship *Thirlmere*.

5. The district court erred in not holding that the limit of libellants' recovery was the proportion that their claim bore to the entire damage caused by sinking the ship *Andrew Johnson*.

6. The district court erred in holding that the bottomry bond was not void by the master's failure to advise owners of cargo before giving it.

7. The district court erred in holding that the master of the ship *Andrew Johnson* had authority to bond the cargo of libellants loaded on the *Mary J. Leslie* by hypothecation thereof, to pay for the expenses of the ship *Andrew Johnson*.

8. The district court erred in holding that the bottomry bond was not avoided by the utter loss of the ship *Andrew Johnson*.

9. The district court erred in not holding that the payment of libellants of the bottomry bond was a voluntary payment of an unfounded and illegal claim.

10. The district court erred in overruling respondent's exceptions to the libel.

11. The district court erred in refusing to allow respondent to introduce new allegations in his answer, and refusing to receive new evidence before final decree.

GEO. A. BLACK,
Proctor for Respondent.

(Endorsed:) Appellant's assignments of error. Filed July 17, 1894.

95 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 8th day of October, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and nineteenth.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

96 U. S. Circuit Court of Appeals for the Second Circuit.

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

Please take notice that upon the trial of the appeal herein I shall offer in evidence the stipulation hereto annexed.

January 26, 1895.

Yours, &c.,
GEO. A. BLACK,
Proctor for Respondent.

To Butler, Stillman & Hubbard, proctors for libellants.

97 U. S. District Court, Southern District of New York.

BRICE ALAN MILLER and Others
against
EDWARD E. O'BRIEN.

It is hereby admitted that Brice Alan Miller and others composing the firm of Gibbs & Company, of Valparaiso, Chile, appeared personally or through their authorized agents, Henry Hucks Gibbs and others, composing the firm of Anthony Gibbs & Sons, of London, England, in a certain proceeding instituted in the high court of justice, admiralty division by James Fisher and others, owners of the Thirlmere against the owners of the ship Andrew Johnson and others to limit their liability, as owners of the Thirlmere for the loss of the ship Andrew Johnson, and her cargo by collision with the Thirlmere, and that in said proceedings, the libellants, Brice Alan Miller and others received the proportion of the value of the ship Thirlmere, which was adjudged to them as owners of the cargo laden on the Andrew Johnson.

This admission may be read and accepted in evidence in this cause in this court or in any other court in which it may be deemed material and relevant, and in which further proofs may be permitted.

Dated New York, July 11, 1894.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

98 United States Circuit Court of Appeals, Second Circuit.

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

This is an appeal from a final decree of the district court, southern district of New York, entered July 12, 1894, in favor of the libellants against the respondent for $6,091.73 with interest and costs.

LACOMBE, *Circuit Judge:*

In June and July, 1884, the libellants shipped on board the "Andrew Johnson," a ship owned by the respondent, at Iquique bay and Caleta Buena, 19,943 bags of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Anthony Gibbs & Sons, of London. Soon after sailing the "Andrew Johnson" encountered heavy weather and met with disaster, whereupon she put into Callao as a port of refuge. Surveys were held and in accordance with the recommendation of the surveyors she was lightened by the discharge of part of her cargo, repairs were made to the vessel and 1,130 tons of her cargo forwarded to Hamburg by another vessel, the "*Mary J. Leslie*," the shipment being made thereon in the name of J. H. Killeran as master of the "Andrew Johnson." For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment

and stowage of cargo, the master incurred expenses aggregating about £2,212, largely for handling cargo and transshipping
99 cargo, the repairs to the ship not being of a permanent nature. In order to raise funds to meet these expenses the master made a bottomry bond, dated September 15, 1884, which will be hereinafter more specifically set forth, to the firm of Grace Bros. & Co. for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599. 8. 9. For the payment of this bond he bound, obligated and hypothecated the "Andrew Johnson," her boats and apparel, and her cargo, including that portion of the cargo transshipped to the "Mary J. Leslie," and his freight. The portion of cargo transshipped to the "Leslie" and the "Andrew Johnson" with the cargo remaining on her were, respectively, worth several times the amount of the bond.

The two vessels sailed from Callao for Hamburg carrying their respective lots of cargo. The "Andrew Johnson" came into collision with the British ship "Thirlmere" and was sunk in mid-ocean, no part of her apparel or cargo being saved. The "Leslie" arrived in regular course at Hamburg on February 5, 1885. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg. On February 10th, the representatives of Baring Brothers & Co., of London, acting on behalf of the owners of the bond, demanded payment of it in full from Wirtz, and on February 11th the representatives of the bondholder and of the consignee of cargo entered into an agreement that the claim against the cargo should be withdrawn, in consideration of Anthony Gibbs & Co. engaging to pay whatever proportion of the bond might be found to be legally due from the cargo of the "Leslie," the question to be submitted to certain eminent and leading lawyers of Hamburg. Thereupon the discharge of the cargo was commenced and completed. The precise date when the "Andrew Johnson" and her cargo were lost does not appear in the record, but the fact of such loss was known in Hamburg when the question as to the effect of such loss was considered by the eminent lawyers to whom it was referred. Neither the ship-owner nor the master nor any representative of either was a party to, or informed of, or present
100 at the proceedings had before the Hamburg referees, nor, so far as appears, was there a scintilla of evidence before them, except the bond and the bill of lading, as to the intention of the contracting parties. The conclusion of the Hamburg lawyers is as follows:

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent, or appear to be lent, contingent upon the safety of the *Andrew Johnson*, and becoming due only after her arrival at her port of destination; but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason that if the bottomry

bond were interpreted in this manner the cargo of the '*Mary J. Leslie*' would be entirely liberated after the loss of the '*Andrew Johnson*' occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested."

The gentlemen who gave this opinion have been examined and they testify that such "opinion agrees with the laws administered in Hamburg," undoubtedly meaning thereby that if the intention of the parties was as they found it, the conclusion they arrived at was correct. Both of them further testified that the law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become void. The provisions of the general German commercial code which have been put evidence in no way conflict with this statement of the expert witnesses as to the parties' power to contract to take the hazard of the vessel's survival.

Upon the announcement of this decision of the Hamburg
101 arbitrators Anthony Gibbs & Sons, for cargo owners, paid to Baring Brothers & Co., for bondholder, the full sum of £2,592 8s. 9d.

The collision by which the "Andrew H. Johnson" and her cargo were sunk was due solely to the fault of the "Thirlmere." The owner of the "Johnson" sued the owners of the "Thirlmere" in the proper English court, in which suit the present libellants, cargo owners, appeared. The owners of the "Thirlmere" limited their liability under the provisions of the British act to £8 per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the "Johnson" received £5,179 on account of the loss of his ship, and £858 on account of his freight, and the libellants here the proportion of the value of the "Thirlmere," which was adjudged to them as owners of the cargo laden on the "Andrew Jackson," but the precise sum does not appear in this record.

The expenses incurred in Callao for which the money was borrowed on the bottomry bond were, as has been before stated, in part chargeable to ship and in part to cargo. Having had an adjustment made in London, the libellants who had paid the bottomry bond brought this suit against the owner of the "Johnson" *in personam* to recover the share of such general and special charges in the port of refuge properly falling upon the vessel, which libellants aver they had to pay in Hamburg in order to redeem their cargo on the "Leslie" from the lien of the bond. Readjustment of some of the items having been made by a commissioner, the district court found in favor of the libellants for $6,091.73, with interests and costs.

It is manifest that the libellants cannot maintain this action unless the bond was a valid obligation when the adventure terminated. The master of the "Andrew Johnson" left no debts behind him for work, or supplies obtained by him in the port of refuge. All

persons who furnished such work or supplies were fully paid, any liens they had therefor discharged, and all indebtedness to them fully extinguished. He secured the means thus to clear ship and cargo from all such claims by bor-
102 rowing the money from Grace Bros. & Co. under a contract which he negotiated with them. If Grace Bros. & Co. had furnished this money as an unsecured loan no one would contend that the cargo owner would have the right to intrude himself into the arrangement, volunteer to repay the loan, and then insist that the ship-owner should pay him in whole or in part. It is only upon the theory that by his negotiations with Grace Bros. & Co. the master of the Johnson so pledged the cargo sent by the "Leslie," that when it arrived in Hamburg it was bound to pay the money borrowed or some part of it; that the cargo owner can contend that such payment was one to which Johnson or its owner should contribute. But if the master borrowed the money upon such terms that in the event of the happening of a specified contingency the cargo should be relieved from all obligation to pay, and such contingency happening the cargo owner nevertheless pays the loan, such payment is a voluntary one so far as the ship-owner is concerned, and it does not cease to be voluntary as to him because it is made in consequence of an unwarranted claim of the lender, or in accordance with an arbitration to which the ship-owner is not a party.

The bond was executed in triplicate on September 15, 1884, by the master in the presence of two witness-, and acknowledged before the United States consul in Callao. It is no brief and informal draft or memorandum. Omitting a few immaterial words and clauses, it reads as follows:

"Know all men by these presents that I, James H. Killeran, master mariner, and commander of the ship 'Andrew Johnson,' of Thomas, Maine, of the measurement, &c., now lying in the port of Callao, am held and firmly bound to Messrs. Grace Bros. & Co., of, &c., in the penal sum of * * * £2,212, to be paid to the said Grace Bros. & Co., or any of them, &c.

"For which payment to be well and faithfully made, I bind myself, my heirs, &c., and also the hull, boats, tackle, apparel and furniture of the *said vessel*, and her cargo of nitrate of soda, including about 1,200 tons of nitrate of soda transshipped on board the British bark 'Mary J. Leslie,' of, &c., and the freight to be
103 earned and become payable in respect thereof, firmly by these presents.

"Sealed, &c.

"Dated, &c.

"Whereas, the *said vessel* lately sailed, &c., * * * sprang a leak, * * * bore up to Callao, * * * was duly surveyed, * * * and certain repairs were recommended to be done to enable the *said vessel* to continue the voyage with safety, and also to transship to another vessel about 1,200 tons of the cargo laden on board the aforesaid 'Andrew Johnson,' in order to enable her to proceed on her voyage with perfect safety;

"And, whereas, all necessary repairs and supplies have been made to the *said vessel*, and the said portion of cargo transshipped to the 'Mary J. Leslie' to enable her to prosecute her said voyage, and she is now in a seaworthy condition and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his *said vessel* which he is totally unable to defray and make good save and except upon the security of the bottom of his *said vessel* and her cargo and freight, hath been necessitated to raise the sum of * * * £2,212 for the payment of the debts incurred as aforesaid and to enable the *said vessel* to proceed to sea on the said intended voyage and which sum the said master has been unable to obtain on his own credit or that of the owners of the *said vessel* or in any other way than by bottomry and hypothecation of the *said vessel*, her boats, apparel, cargo and freight;

"And whereas, the said Grace Bros. & Co. have, at the request of the above-bounden James H. Killeran, agreed to lend and advance to him the sum of * * * £2,212 * * * for the purpose aforesaid upon his executing this present bond or obligation and hypothecation of the *said vessel*, her boats and apparel and her cargo, including that portion of the cargo transshipped to the 'Mary J. Leslie' and the freight to be earned and become payable in respect of the said voyage, and the said Grace Bros. & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the *said vessel* 'Andrew Johnson,' her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid, and for securing the repayment of the said sum, * * *

104 the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the *said vessel*, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transshipped to the 'Mary J. Leslie,' and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Bros. & Co., their executors, &c.

"Now, the condition of this obligation is such that if the *said vessel* shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Bros. & Co., &c., upon the present obligation the sum of £2,212, &c., being the principal money of this obligation, and the further sum of £387 for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds ten per centum, making together £2,599, &c., &c.

"Or, if during said voyage an utter loss of the *said vessel* by fire, enemies, pirates, the perils of the sea or navigation, or any other

casualty, shall unavoidably happen, &c., &c. then, and in either of the said cases, this obligation shall be void, or otherwise to be and remain in full force and virtue."

It will be observed that this elaborate and carefully worded document sets forth all the essential circumstances under which the contract was made between Grace Bros. & Co. and the master, as fully as the record in this case does. The disaster, the seeking a port of refuge, the survey, the repairs to the ship, the handling of the cargo, the necessity of lightening the "Andrew Johnson" to enable her to complete her voyage, the transshipment of about 1,200 tons of cargo to the "Leslie," the inability of the master to raise the money to pay expenses—all these are fully disclosed by the instrument itself, and the other evidence in the case adds nothing to our information as to the situation existing when the bargain was made. The bond is clearly expressed and free from any ambiguity. The words
105 "said vessel," wherever they are used, from the beginning to the end of the bond, refer grammatically and logically to the "Andrew Johnson," and to her only. To hold that the last paragraph should read "Or if during said voyage an utter loss of *both of said vessels* * * * shall unavoidably happen, &c.," would not be construction, but alteration of its language. It is not the function of the court to make changes in a written instrument which is apparently deliberately agreed upon, and which unambiguously expresses in plain language a definite meaning (Dumont *vs.* U. S., 98 U. S., 142), where there is no suit to reform the instrument, no evidence of mistake, no proof tending to show that words or phrases contained in it are used with special meaning. Interpretation according to intent is not to be resorted to when the document itself suggests no ambiguity, when it covers the whole subject-matter of the contract between the parties, and when there is no proof of any intent contrary to that expressed upon its face.

The arbitrators assumed, wholly without proof, that the contracting parties had carelessly employed some form of bond which happened to be at hand. They and the district court reached the conclusion that the real intention of the parties was that repayment of the money loaned should be contingent upon the safety of either vessel. The only reasons advanced for such a conclusion are that bottomry bonds are to be construed favorably to the lender; that they, the arbitrators and the district judge, find it inconceivable that the parties should have embraced the transshipped cargo in the bond without intending it to answer for the bottomry loan if the "Leslie" arrived safely, although the "Johnson" were lost; and that the cargo on the "Leslie" ought not to wholly escape if the "Johnson" were lost, since a part, at least, of the bottomry debt represented general average which the cargo ought to pay. The answer to all these suggestions is that they are mere inference and assumption, unsupported by proof, as to the intention of an experienced business man in a distant quarter of the globe who has expressed
106 his intention in plain English the other way, and who must, in the absence of proof, be assumed to be intelligent enough to understand the meaning of the words he used, and sufficiently

appreciative of his own business interests to see to it that the contract he made was the best contract he could get. When the firm of Grace Bros. & Co. expressly state in careful phraseology that they lend their money and "are *contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said 'Andrew Johnson,'* her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid (the 'Johnson's' cargo is uniformly referred to in the bond as cargo laden on board, the 'Leslie's' as cargo transshipped) and the freight to be earned and become due," it will not do to hold, without proof, that they meant to stand to and bear a very different risk. Moreover, for the risk they took as it is stated in the bond, viz., the loss of their loan if the "Johnson" became an utter loss they charged a premium of 17½ per cent. But if they staked their loan on the safe voyage of either vessel, so that they could lose nothing unless both vessels met with disaster, manifestly their risk was far less, and who in Hamburg or New York can say whether the parties intended to pay a like premium of 17½ per cent. for such a risk? If courts thus, of their own motion and without proof of mistake or of intent reform mercantile contracts as clearly expressed as this, no business man can feel any confidence that his most careful choice of words will ensure a construction of his agreement accordant to his own expressed intention or otherwise than as the court may think such intention was or ought to have been.

We are of opinion, therefore, that the bond became void upon the sinking of the "Andrew Johnson" with her cargo, and not thereafter enforceable against the 1,130 tons transshipped to the "Leslie," and that the payment of the bond by the consignee of that 1,130 tons was voluntary and gave the cargo owner no right to call upon the owner of the "Johnson" for the repayment of any part
107 thereof. The proposition that the 1,130 tons on the "Leslie" is to be treated "like any salvage from the wreck of the 'Johnson,' precisely as if it had been rescued by the 'Leslie' from the 'Johnson' a few moments before the latter went down in mid-ocean," and that it therefore remained subject to the bottomry lien after the "Johnson" went down, is overstrained. In no possible sense was the 1,130 tons salvage of the "cargo laden on board" the "Johnson" on the voyage of that ship from Callao to Hamburg, which was the voyage on whose safe termination the bottomry tender staked his money.

It is not necessary to discuss the question whether a bottomry bond covers salvage when it is a full and formal instrument and contains no saving clause reserving to the lenders, in case of utter loss, any average that might be secured upon all salvage recoverable, a clause which is usual in such full and formal instruments (Ins. Co. *vs.* Gossler, 96 U. S., 645), since there has been no salvage either of cargo or ship in this case. The damages recoverable against the delinquent vessel which sent the "Andrew Johnson" and her entire cargo to the bottom are certainly not salvage. It may be that the bondholder, in the event of an utter loss which made his bond void, would have a direct claim against the offending vessel for damages

caused to him by the destruction of property in which he had an interest superior to the owners, and that when the offending vessel had made restitution in money for such destruction in whole or in part, and the amount thus paid has come to the hands of the owner, the bondholder can sustain an action against him for money had and received (Smith *vs.* Williams, 2 Caine's Cases in Error, 109; Read *vs.* Mutual Ins. Co., 3 Sanford, 54; Watson *vs.* Ins. Co. of N. A., 3 Wash. C. C., 1; Appleton *vs.* Crowninshield, 3 Mass., 448; Same *vs.* Same, 8 Mass., 358; The Empusa, 5 P. D., 6). The bondholder recovers in such a case, however, not upon any theory that his bond survives as an obligation enforceable against the fund, as the representative of the ship. No doubt damages recovered for the tortious act of a colliding vessel are often treated in
108 admiralty as a substitute for the destroyed vessel. But the hazard taken by the bottomry bondholder is the physical survival of the ship, or at most of any salvage from her. When she goes to the bottom with all she holds there is an utter loss within the meaning of the contract of bottomry, and the bond goes down with the vessel. Recovery by the bondholder under such circumstances is, as above stated, either against the offending vessel for destroying the property interest which the bond gave him, or against the person who has without right appropriated his share of the damages. But that is not this case. Libellants are not suing as assignees of the bondholder to recover damages for the destruction of the bond either from the person or thing responsible for such destruction or from the respondent as having received those damages to the use of the bondholder. The whole action is based upon the theory that libellants paid the bond, as an obligation they were bound to pay, and now ask to be repaid the proportion due under the bond from respondent. As the record shows that by the happening of the contingency upon which the loan was hazarded the bond became wholly void, libellants were under no obligation to pay it, and having paid it can claim nothing under it from respondent.

The decree of the district court is reversed with costs of both courts.

(Endorsed:) U. S. circuit court of appeals, second circuit. Brice Alan Miller *et al. vs.* Edward E. O'Brien. Opinion. Lacombe, J. United States circuit court of appeals, second circuit. Filed April 16, 1895. James C. Reed, clerk.

109 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 108, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs,

Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, libellants and appellees, *versus* Edward E. O'Brien, respondent and appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Edward E. O'Brien is respondent and appellant and Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs are libellants and appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, *and* we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
111 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

112 [Endorsed:] Supreme Court of the United States, October term, 1894. No. 997. Edward E. O'Brien *vs.* Brice Alan Miller *et al.* Writ of certiorari.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of cer-

tiorari and in obedience thereto, do hereby certify that the following pages, numbered from 4 to 6, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, and Alfred Naylor, libellants, appellees, against Edward E. O'Brien, respondent, appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eleventh day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

113 United States Circuit Court of Appeals for the Second Judicial Circuit.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL, and ALFRED NAYLOR, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above-entitled cause that the record certified from this court and filed in the Supreme Court of the United States with the libellants' petition for a writ of certiorari, together with a copy of the order entered herein May 6th, 1895, and a copy of the order entered herein May 8th, 1895, be taken and deemed as the record returned from this court under said writ, and that the said writ be returned to the Supreme Court of the United States with this stipulation or a duly certified copy thereof and with a copy of said orders attached.

New York, May 9th, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.
GEO. A. BLACK, *Proctor for Respondent.*

(Endorsed:) Circuit court of appeals. Brice Alan Miller and others, libellants, against Edward E. O'Brien, respondent. Stipulation. Butler, Stillman & Hubbard, proctors for libellants, 54 Wall street, New York city. United States circuit court, second circuit. Filed May 11, 1895. James C. Reed, clerk.

114 At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms, in the U. S. post-office building, in the city of New York, on the 6th day of May, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, John Isdaile Smail, and Alfred Naylor, Libellants & Appellees,

versus

EDWARD E. O'BRIEN, Respondent & Appellant.

This cause having come on to be heard on the appeal of the respondent herein from a final decree of the district court of the United States, entered July 12th, 1894, and having been argued and submitted and due deliberation having been had, now, on motion of George A. Black, proctor for appellant, it is—

Ordered, adjudged, and decreed that the said decree of said district court be, and the same hereby is, reversed and the libel herein dismissed, with costs of this court and of said district court to the respondent, and that a mandate issue from this court to said district court to enter a decree herein in accordance with this decision.

115 At a stated term of the United States circuit court of appeals for the second circuit, held in the United States court-rooms, in the city of New York, the 8th day of May, 1895.

Present: Hon. William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL, and ALFRED NAYLOR, Libellants,

against

EDWARD E. O'BRIEN, Respondent.

Upon the affidavit of Wilhelmus Mynderse, verified May 7th, 1895, and upon the order to show cause thereon granted, and it being made known to the court that no mandate has in fact yet issued out of this court, it is now, after hearing Wilhelmus Mynderse for the libellants, and no one appearing to oppose—

Ordered that the issuance of any mandate under the order entered herein on the 6th day of May, 1895, be, and that it hereby is, stayed pending the determination of this cause in the Supreme Court of the United States.

116 [Endorsed:] Case No. 15,881. Supreme Court U. S., October term, 1896. Term No., 266. Edward E. O'Brien, app't, *vs.* Brice Alan Miller *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed May 15, 1895. James H. McKenney, clerk.

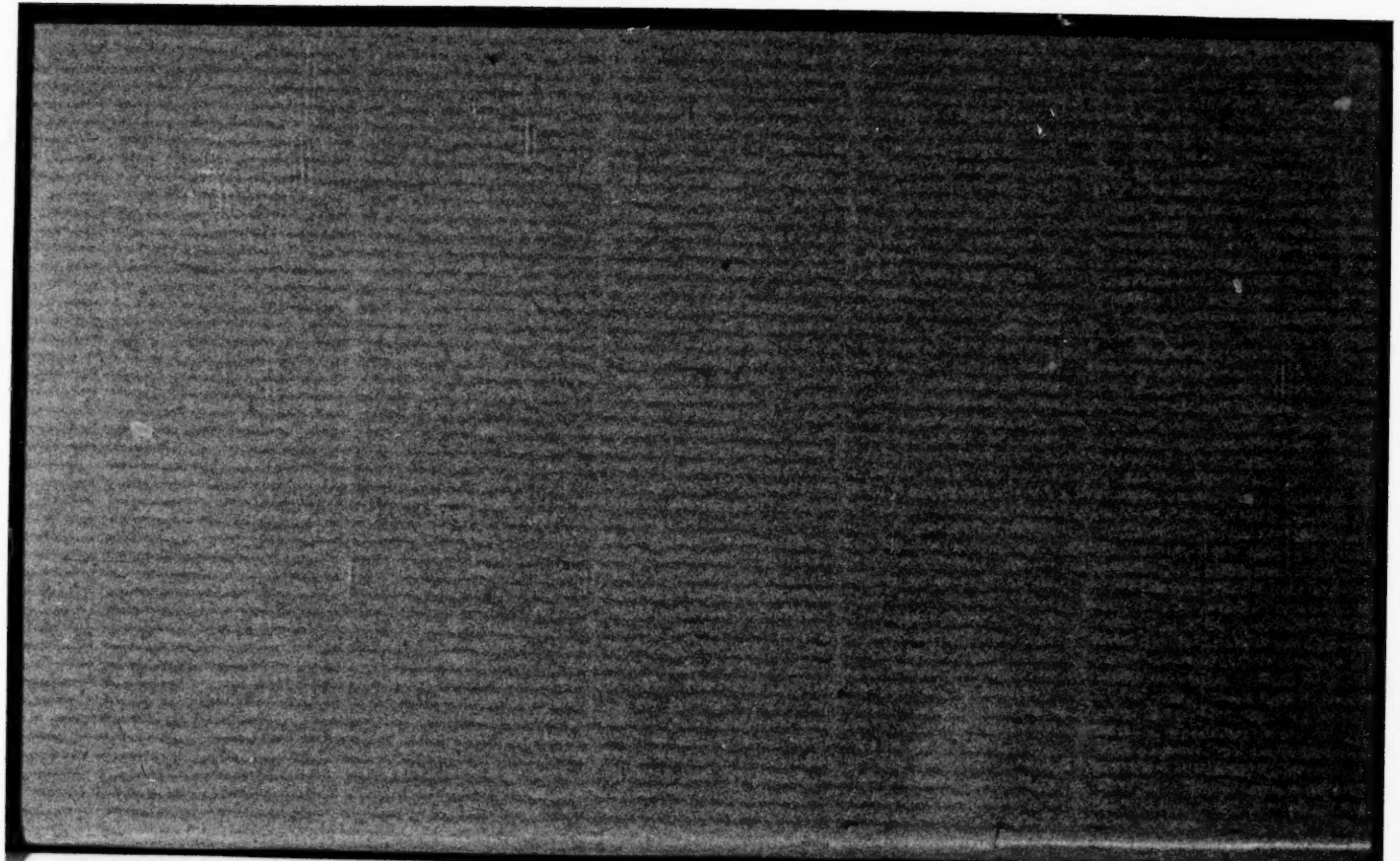
EDWARD F. O'BRIEN,

Respondent.

Petition of Libellants for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioners.



United States Circuit Court of Appeals

SECOND JUDICIAL CIRCUIT.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants,

AGAINST

EDWARD E. O'BRIEN,
Respondent.

Notice is hereby given that upon the petition of the libellants above named, verified the 23d day of April, 1895, and upon all the pleadings and proceedings herein, we shall, on Monday, the 29th day of April, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which is herewith served upon you, to the Supreme Court of the United States at the Capitol in the City of Washington.

New York, April 23d, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

TO GEORGE A. BLACK, ESQ.,
Proctor for Respondent.

SUPREME COURT OF THE UNITED STATES.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,

Libellants,

AGAINST

EDWARD E. O'BRIEN,

Respondent.

And now come Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, by Wilhelmus Mynderse, their advocate, and move this Honorable Court for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all of the proceedings by them had in the suit now or lately before them, wherein Brice Alan Miller, Thomas Denison Camber, John Manley Lowe, John Isdaile Smail and Alfred Naylor were libellants, and Edward E. O'Brien was respondent.

WILHELMUS MYNDERSE,
Advocate for Petitioners.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor for a writ of *certiorari* to the Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit to bring before the Supreme Court of the United States a certain

suit in admiralty wherein they are libellants against Edward E. O'Brien, respondent, respectfully shows:

FIRST. At all the times hereinafter mentioned the petitioners Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor were copartners doing business in Valparaiso, Chili, under the firm name of Gibbs & Company, and the respondent was a resident of Maine and owner of the American ship *Andrew Johnson*.

SECOND. In June and July, 1884, the petitioners shipped on board the *Andrew Johnson* at Iquique Bay 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Son in London.

On the 15th day of July, the ship, under the command of her master J. H. Killeran, sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter, while in the prosecution of her voyage, suffered from heavy weather to such extent that she necessarily sought a port of refuge. She went into Callao, where, after surveys, it was determined that she could not prudently continue her voyage without repairs. Under the recommendation of surveyors she was lightened of cargo for examination and her injuries located. The surveyors recommended that the top sides and waterways be horsed and calked; the main decks calked; the hood ends carefully overhauled and refastened where necessary, and calked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and they reported that, with such repairs and thus lightened, the vessel could proceed on her voyage with safety. Their recommendations were made, as stated in their report, in the interest of both the owners of ship and cargo.

THIRD. The master of the *Andrew Johnson*, in accordance with the recommendations of the survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie*. The shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the follow-

ing endorsement, signed by W. H. McLeod, master of the *Mary J. Leslie :*

"8,449 bags of nitrate of soda as per this bill of lading are "included in and jointly responsible with the nitrate of soda "specified in the bottomry and respondentia bond given to "Messrs. Grace Brothers & Co. as security for the payment "of the American ship *Andrew Johnson's* disbursements in "Callao."

FOURTH. For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master of the *Andrew Johnson* incurred serious expenses. The vouchers for these expenses have been produced and proved and show an aggregate of 13,-237.72 Peruvian soles, equivalent to £2,212 5s 9d British sterling. In order to raise funds to meet these expenses the master made a bottomry bond in favor of Grace Brothers & Co. bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599 8s 9d. For the payment of the bond he bound, obligated and hypothecated the *Andrew Johnson* and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie* and his freight. The bond was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at final port of destination and "before commencing to discharge the cargo" and with the provision that if during the voyage there should be an "utter loss" of said vessel the bond should be void and that otherwise be and remain in full force and virtue. A full copy of the bond is set forth in the record filed herewith on *pages 13-17*.

FIFTH. Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie*, sailed from Callao for Hamburg carrying their respective lots of cargo. The *Andrew Johnson* later met collision with the British ship *Thirlmere*, and was sunk in mid-ocean. The *Mary J. Leslie* arrived in regular course at Hamburg on February 5, 1885. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg.

SIXTH. On the 10th of February formal demand was made

upon Mr. Wirtz for the payment of the bond by Berenberg, Gossler & Co., as representatives of Baring Brothers & Co., of London, who were acting on behalf of the owners of the bond. No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and under the provisions of the German law it could not be discharged until the bond was paid or payment secured.

SEVENTH. On the 11th of February, in order to secure a release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia on the cargo of nitrate of soda to our order arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of the said bottomry and respondentia bond may be found to be legaily due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Walton and Messrs. William Richards & Son, in London; or, if it be found to be governed by Hamburg law, to equally competent authorities there to be appointed by your agents and ours."

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co. as follows:

"With reference to your letter of this date, we understand your guaranty to be equally binding should the case be decided to be governed by Hamburg law, and shall accordingly telegraph our friends in Hamburg to release the cargo of the *Mary J. Leslie*."

Thereupon the discharge of the cargo was commenced and was completed February 27th.

EIGHTH. In order to determine the amount legally due from that portion of the cargo transported on the *Mary J. Leslie*, Messrs. Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, submitted the question to Dr. Wolffson and Dr. Stammann, eminent and leading lawyers of Hamburg, who decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond. The value of

that portion of the cargo was about $40,000, and, therefore, far in excess of the amount of the bond.

Dr. Stammann and Dr. Wolffson gave their opinion March 14th as follows:

"HAMBURG, 14 March, 1885.

"HUGO WIRTZ, ESQRE
"MESSRS. J. BERENBERG, GOSSLER & CO,

"We formulate the question which you, in the names of "Messrs. Anthony Gibbs & Sons and Messrs. Baring Brothers "& Co have submitted to our judgment, as follows:

"'Whether the portion of the cargo of nitrate of soda of "'the *Andrew Johnson* brought home per *Mary J. Leslie* is "'liable for the whole amount of the Bottomry Bond which "'was signed in Callao and whether, consequently, the re-"'ceiver of this portion of the cargo has to pay the whole of "'the Bottomry Bond, provided the value of this portion of "'the cargo is not less than the amount of the Bottomry "'Debt?'

"This question we must answer in the affirmative because, "according to the law here, ship, freight and cargo of the "*Andrew Johnson*, as well as the portion of the cargo which "was transshipped into the *Mary J. Leslie* are jointly liable "for the whole amount raised on Lottomry at Callao, and "therefore the *Andrew Johnson* and her cargo having become "a total loss, the holder of the Bottomry Bond can come upon "that portion of the cargo which was shipped by the *Mary J.* "*Leslie* for the whole amount of his claim.

"Some doubt might be raised as to whether, according to "the wording of the Bottomry Bond, the money was not lent, "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination; but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention of "the contracting parties, and that the wording referred to has "originated in the not sufficiently careful use and employment "of a form of Bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "Bottomry Bond were interpreted in this manner the cargo of "the *Mary J. Leslie* would be entirely liberated after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the Bottomry Debt, which nevertheless has arisen "out of a case of General Average. Manifestly this cannot "have been the intention of the parties interested.

"Yours truly,
"J. OTTO STAMMANN,
"J. WOLFFSON."

Thereupon and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Bros. & Co. the full sum of £2,592.7.9.

NINTH. The collision by which the *Andrew Johnson* and her cargo was sunk was due solely to the fault of the *Thirlmere*. The owner of the *Andrew Johnson* brought suit against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by the collision, valuing the vessel at $60,000. The owners of the *Thirlmere* limited their liability under the provisions of the British act to £8 sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson*, the respondent herein, received £5,179.13.6 on account of the loss of his ship, and £858.6.11 on account of her freight. The libellants received such proportion of the value of the *Thirlmere* as was due them in respect to the cargo sunk with the *Andrew Johnson*.

TENTH. After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by Messrs. William Richards & Sons, average adjusters, to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson*, either as general or special charges, and what portion against the owners of the cargo.

ELEVENTH. In July, 1887, this action was instituted by the libellants claiming to recover from the respondent, as owner of the *Andrew Johnson*, the share of general and special charges properly falling upon the vessel which had been paid by the funds raised on bottomry. In that libel it was alleged, through error of the pleader, who had not been advised of the circumstances attending the sinking of the *Andrew Johnson*, that the *Andrew Johnson* and her freight had become a total loss. Under exceptions filed to the sufficiency of the libel, argument was had in April, 1888, and the general exception that no sufficient cause of action was stated was sustained, upon the ground that under the statutes of the United States the shipowner's liability was limited to the value of his sunken vessel. Subsequently amendments were made by which it appeared that the *Andrew Johnson* had not, in fact, become a total loss at sea, but had been sunk by the *Thirlmere*, and that the

owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557 9s. 6d. The libel as so amended is the one upon which the cause was tried in the District Court.

TWELFTH. The libel was sustained upon the trial, and it was ordered that the libellants "recover so much of the moneys "paid by them in satisfying the bottomry and respondentia "bond referred to in the libel as upon proper adjustment is "properly chargeable to the owner of the ship *Andrew Johnson* "and her freight." Reference was ordered to William A. Walker, as Special Commissioner, to ascertain and compute such amount. He found that the libellants were entitled to recover the principal sum of $6,091.73; for which sum, with interest and costs, a decree was entered in the District Court in favor of the libellants July 12, 1894, in the aggregate amount of $9,598.94.

THIRTEENTH. Appeal was taken from this decree by the respondent to the United States Circuit Court of Appeals for the Second Judicial Circuit, where it came on for argument in March, 1895. Decision was filed April 16, 1895, holding that the decree of the District Court should be reversed and that the libel should be dismissed with costs, upon the stated ground that by the strict language of the bottomry bond it became void when the *Andrew Johnson* was sunk at sea.

The eminent lawyers to whom this point among others had been presented in Hamburg had said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent, "or appeared to be lent, contingent upon the "safety of the *Andrew Johnson*, and becoming due "only after her arrival at her port of destination, but "becoming null and void in the event of her non-arrival; "we are of opinion, however, that this interpretation is not "consistent with the real intention of the contracting parties, "and that the wording referred to originated in the not sufficiently careful use and employment of a form of bond which "happened to be at hand. This seems the less doubtful to us "for this reason, that if the bottomry bond were interpreted in "in this manner, the cargo of the *Mary J. Leslie*, would be entirely liberated after the loss of the *Andrew Johnson* occurred, "and would not even bear a portion of the bottomry debt

" which, nevertheless, had arisen out of a case of general aver-
" age. Manifestly this cannot have been the intention of the
" parties interested."

The District Judge reached the same result in considering the exceptions to the original libel, at which time it was assumed that the *Andrew Johnson* and her freight had indeed become a total loss, he holding that the condition might be fairly construed as intended to mean that the only obligation that was to become void through the loss of the *Andrew Johnson* was the personal obligation of the master or his agreement to pay the loan, leaving the pledge operative upon any salvage recoverable or upon any portion of the pledged property reaching the port of destination *(Opinion on Exceptions, fols. 211, 212)*. Upon further consideration of the question at the time of the trial of the cause, at which time it appeared that the *Andrew Johnson* and her freight had not become an " utter loss," the District Judge adhered to the construction of the bond theretofore made by him, saying:

" It seems to me inconceivable that the parties should thus
" explicitly have embraced this part of the cargo in the bond
" without intending it to answer for the bottomry loan on safe
" arrival at Hamburg, even though the *Andrew Johnson* might
" perish. The ambiguous phraseology of the bond in using
" the term 'the said vessel' should be so construed as to effect-
" uate the obvious intention of the whole instrument by making
" the words 'the said vessel' include both vessels, that is, by
" interpreting the singular for the plural if necessary. *Ut res*
" *majis valeat quam pereat*" (Opinion, fols. 226, 227).

The United States Circuit Court of Appeals, in directing the reversal of the decree of the District Court, held that the condition of the bond,

" or if during the said voyage an utter loss of the said
" vessel by fire or enemies, pirates, the perils of the sea or
" navigation, or any other casualty, shall unavoidably happen to
" be sufficiently proved by the said James H. Killeran, then
" and in either of the said cases, this obligation shall be void
" or otherwise to be and remain in full force and virtue,"

was susceptible of strict construction; that the words "the said vessel" meant the *Andrew Johnson*, and could not be considered to refer to the *Mary J. Leslie*, and that the sinking of the *Andrew Johnson* at sea constituted " an utter loss," even

though the circumstances attending her sinking were such as to give to her owner a valuable right of recovery against the *Thirlmere*, which right he availed of to his profit. They accordingly held that the libellants were under no legal liability to pay the bond in Hamburg, and that their payment must be deemed a voluntary payment, giving them no remedy against the owner of the *Andrew Johnson*.

FOURTEENTH. Your petitioners aver that this case is one in which it is proper for this Court to issue a writ of *certiorari*, for the following reasons:

1st. Because there has been a disagreement between the District Judge (with whose opinion the Hamburg lawyers were in accord) and the United States Circuit Court of Appeals in the construction of a written instrument, there being no dispute of facts.

2d. Because the United States Circuit Court of Appeals have determined as a question of law, and in conflict with the decision of the District Judge, that the holders of the bottomry bond had no right to resort to the cargo transported on the *Mary J. Leslie* after the sinking of the *Andrew Johnson*.

3d. Because the United States Circuit Court of Appeals have held, in conflict with the decision of the District Judge, that the *Andrew Johnson* became in the contemplation of the bond "an utter loss," although by her sinking there was left to her owner a valuable right of recovery against the owners of the *Thirlmere*.

4th. Because the Supreme Court of the United States have never directly determined the measure of a shipowner's liability in the event of his vessel being lost through the act of a wrongdoer under such circumstances as to give him a valuable right of recovery against such wrongdoer,

The City of Norwich, 118 U. S., 468, 493, 503, 504,

though it is determined by that decision that a shipowner is not required to account for insurance money received by him under independent contracts of insurance.

5th. Because the Supreme Court of the United States have never determined that a vessel is an "utter loss" when she perishes under such circumstances that the very circumstances give to her owner a valuable right of recovery against the wrongdoer who has occasioned the physical destruction of the vessel.

6th. Because the questions involved are purely questions of law and of great importance to the commercial community.

Wherefore, your petitioners pray that this Honorable Court will be pleased to grant a writ of *certiorari* in this cause to the United States Circuit Court of Appeals for the Second Judicial Circuit, to bring this cause before this Honorable Court, and for such other relief as to this Honorable Court may seem just.

BUTLER, STILLMAN & HUBBARD,
Proctors for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, ss:

WILHELMUS MYNDERSE, being duly sworn, says that he is a member of the firm of Butler, Stillman & Hubbard, proctors for the libellants Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, and that he is authorized to make this verification on his own behalf. That he has read the foregoing petition and knows the contents thereof, and that the allegations contained therein are true according to deponent's information and belief. The sources of deponent's knowledge and the grounds of his belief are found in the proceedings and in the record of the cause in the District Court and in the United States Circuit Court of Appeals.

Deponent further says that none of the libellants reside within the United States, but, on the contrary, reside in South America, where they now are, as deponent believes.

WILHELMUS MYNDERSE.

Sworn to before me this 23d day of April, 1895.

CHARLES C. NOTT, JR.,
Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the petition is well founded, and that the same is one in which the prayer of the petitioners should be granted.

WILLIAM ALLEN BUTLER.

No. 997. Sup. Ct. U.S. Oct. Term, 1895.

Brief of Petitioners for Writ of Certiorari.

Filed April 26, 1895.

Supreme Court, U.S.
FILED.
APR 26 1895
JAMES H. McKENNEY,
CLERK.

997

SUPREME COURT OF THE UNITED STATES.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,

Libellants and Petitioners,

against

EDWARD E. O'BRIEN,

Respondent.

Brief in Support of Libellants' Petition for Writ of Certiorari.

BUTLER, STILLMAN & HUBBARD,

Proctors for Petitioners.

Supreme Court of the United States.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants and Petitioners,

AGAINST

EDWARD E. O'BRIEN,
Respondent.

Brief in Support of the Petition of Libellants for a Writ of Certiorari.

This action was originally instituted in the District Court of the United States for the Southern District of New York by the libellants, composing the firm of Gibbs & Co., of Valparaiso, Chili, owners of a shipment of nitrate of soda, against the respondent as owner of the ship *Andrew Johnson*, to enforce contribution to general average expenses incurred in Callao, Peru, which had been paid by the libellants through a bottomry and respondentia bond affecting their cargo.

Statement of Facts.

In June and July, 1884, the libellants shipped on board the *Andrew Johnson*, at Iquique Bay, 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Sons, of London *(Exhibits 1, 2 and 3, fols. 85–91).*

On the 15th of July the ship sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter met with heavy weather and with disaster, and necessarily sought a port of refuge *(Killeran, fol. 79).*

She went into Callao, and her condition was such that she could not prudently continue her voyage without repairs *(Answer, fol. 61; Killeran, fol. 79).*

A survey was held August 4th, by which it was found that certain butts and seams at the water's edge were very soft, and that water had entered in considerable quantities from the top sides, though she was making comparatively little water while lying in port. The surveyors recommended that she be lightened of cargo until her upper sheets of metal should be out of water for further examination *(First Survey, Ex. 4, fols. 93, 94).*

After the vessel had been lightened by the discharge of 900 tons of cargo she was further examined August 24th. The surveyors recommended that the top sides and water ways be horsed and caulked and the main decks caulked from foremast forward, the hood ends carefully overhauled, re-fastened where necessary and well caulked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and reported that with the above repairs and thus lightened the *Andrew Johnson* could proceed on her voyage with safety. This they said they considered to be in the interest of both the owners of ship and cargo *(Second Survey, Ex. 5, fols. 97–100).*

The final survey was held September 10th, in which the surveyors reported that the repairs ordered by them had been well executed, the top sides had been horsed and caulked, the several hood ends re-fastened, the main deck forward re-caulked and two new bilge pumps supplied; that the cargo remaining on board had been well stowed and carefully distributed, and that the vessel was making no water *(Third Survey, Ex. 6, fols, 103, 104).*

The master of the *Andrew Johnson*, in accordance with the recommendations of the second survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie (Killeran, fols. 81, 82).*

The shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the following endorsement signed by W. H. McLeod, master of the *Mary J. Leslie:*

"The 8,449 bags of nitrate of soda as per this bill of lading "are included in and jointly responsible with the nitrate of "soda specified in the bottomry and respondentia bond given "to Messrs. Grace Bros. & Co. as security for payment of the "American ship *Andrew Johnson's* disbursements in Callao."
Exhibit 7, fol. 82; fols. 53–56.

For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master incurred serious expenses *(Amended Libel, fol. 31; Answer, fol. 61; Bond, fol. 43).*

The vouchers for these expenses have been proved and show an aggregate of 13,237.72 Peruvian soles, equivalent to £2,212, 5, 9 *(Vouchers, fols. 83, 84; Answer, fol. 61).*

In order to raise funds to meet these expenses the master made a bottomry bond in favor of Grace Brothers & Co., bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599, 8, 9 *(Killeran, fols. 81–83; Bond, fols. 39–50)* or about $12,500. Grace Bros. & Co. appear to have been general agents for the respondent, though there is no proof that they advanced upon the bottomry bond as agents *(Exh. 3, fol. 88; O'Brien, fols. 109, 111).*

For the payment of the bond the master bound, obligated and hypothecated the *Andrew Johnson* and her cargo,, 'including that "portion of the cargo transshipped to the *Mary J. Leslie,*" and his freight *(Bond, fol. 45).*

The payment was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at her final port of destination and "before commencing to discharge the cargo," free of any average, and with the provision that, if during the voyage there should be "*an utter loss*" of said vessel, the bond should be void, and otherwise be and remain in full force and virtue *(Bond, fols. 47–50).*

Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie,* sailed from Callao for Hamburg carrying their respective lots of cargo.

The value of the *Andrew Johnson* was about $60,000, the value of her freight was $20,000, and the value of the cargo remaining on board of her about $50,000. The value of the cargo transshipped to the *Mary J. Leslie* was about $40,000.

The *Andrew Johnson* met collision with the British ship *Thirlmere* and was sunk in mid-ocean *(Killeran, fol. 84)*.

The *Mary J. Leslie* arrived in regular course at Hamburg on February 5th, 1885 *(Wirtz, fol. 143)*. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg *(Wirtz, fol. 142)*.

On the 10th of February formal demand was made upon Mr. Wirtz for the payment of the bond by Herman Stockfleth, notary, acting on behalf of Berenberg, Gossler & Co., bankers *(Stockfleth, fol. 141; Wirtz, fol. 144)*.

Berenberg, Gossler & Co. represented Baring Brothers & Co. of London, who were acting on behalf of the owners of the bond *(Sillem, fol. 121: Wirtz, fol. 144)*.

No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and by the terms of the bond and under the provisions of the German law it could not be discharged until the bond was paid or payment secured *(Bond, fol. 47; German Commercial Code, Section 695, fol. 179)*.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia on the cargo of nitrate of soda to our order arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of the said bottomry and respondentia bond may be found to be legally due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Waltons and Messrs. William Richards & Son in London, or if it be found to be governed by Hamburg law, to equally competent authorities there to be appointed by your agents and ours" *(Sillem, fol. 121; Exhibit A, fols. 125, 126)*.

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co., as follows:

"With reference to your letter of this date we understand your guaranty to be equally binding should the case be de-

" cided to be governed by Hamburg law, and shall accordingly " telegraph our friends in Hamburg to release the cargo of the " *Mary J. Leslie.*"

Sillem, fols. 121, 122 ; *Exhibit B, fol.* 127.

Thereupon the discharge of the cargo was commenced and was completed February 27th *(Wirtz, fol.* 146).

In order to determine the amount legally due to the bondholders from that portion of the cargo transported on the *Mary J. Leslie* Messrs. Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, appointed Dr. Wolffson and Dr. Stammann, " eminent and leading lawyers of Hamburg"; and these gentlemen decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond *(Sillem, fols. 123, 124 ; Wirtz, fol. 145).*

The value of that portion of the cargo was about $40,000, and therefore far in excess of the amount of the bond *(Wirtz, fol.* 146*).*

Dr. Stammann and Dr. Wolffson gave their opinion March 14th *(fols. 155–158),* as follows :

" Hamburg, 14 March, 1885.

" Hugo Wirtz, Esqre.
" Messrs. J. Berenberg, Gossler & Co.

" We formulate the question which you, in the names of " Messrs. Anthony Gibbs & Sons and Messrs. Baring Brothers " & Co. have submitted to our judgment, as follows :

" ' Whether the portion of the cargo of nitrate of soda of the " ' *Andrew Johnson* brought home per *Mary J. Leslie* is liable " ' for the whole amount of the Bottomry Bond which was " ' signed in Callao, and whether, consequently, the receiver of " ' this portion of the cargo has to pay the whole of the Bot- " ' tomry Bond, provided the value of this portion of the cargo " ' is not less than the amount of the Bottomry Debt ?

" This question we must answer in the affirmative, because " according to the law here, ship, freight and cargo of the " *Andrew Johnson*, as well as the portion of the cargo which " was transshipped into the *Mary J. Leslie* are jointly liable " for the whole amount raised on Bottomry at Callao, and, " therefore, the *Andrew Johnson* and her cargo having become " a total loss, the holder of the Bottomry Bond can come upon

" that portion of the cargo which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim.

" Some doubt might be raised as to whether, according to
" the wording of the Bottomry Bond, the money was not lent,
" or appear to be lent contingent upon the safety of the *An-*
" *drew Johnson*, and becoming due only after her arrival at her
" port of destination ; but becoming null and void in the event
" of her non-arrival. We are of opinion, however, that this in-
" terpretation is not consistent with the real intention of the
" contracting parties, and that the wording referred to has
" originated in the not sufficiently careful use and employment
" of a form of Bond which happened to be at hand. This
" seems the less doubtful to us for this reason, that if the
" Bottomry Bond were interpreted in this manner the cargo of
" the *Mary J. Leslie* would be entirely liberated after the loss
" of the *Andrew Johnson* occurred, and would not even bear a
" portion of the Bottomry Debt, which, nevertheless, has
" arisen out of a case of General Average. Manifestly this
" cannot have been the intention of the parties interested.

" Yours truly,
" J. Otto Stammann,
" J. Wolffson."

The result was at once communicated to London, and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Brothers & Co. the full sum of £2,592, 7, 9 *(Sillem, fol. 124)*.

Suit was brought by the owners of the *Andrew Johnson* against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by collision, valuing the vessel at $60,000 *(O'Brien, fol. 109)*. The owners of the *Thirlmere* limited their liability under the provisions of the British Act to £8–0 Sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson* received £5,179, 13, 6 on account of the loss of his ship and £858, 6, 11 on account of her freight *(O'Brien, fol. 114)*.

After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by William Richards & Sons, average adjusters, to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson* either as general or special charges, and what portion against the owners of the cargo *(Richards, fols. 129, 130)*.

Then and in July, 1887, this action was instituted by the

libellants, claiming to recover from the owner of the *Andrew Johnson* the share of general and special charges properly falling upon the vessel, and which had been paid by the funds raised on bottomry.

In that libel it was alleged, though an error of the pleader, that the *Andrew Johnson* and her freight had become a total loss. Under exceptions filed to the sufficiency of the libel argument was had in April, 1888, and one of the exceptions was sustained *(Opinion, fols. 199–218)*.

Thereupon the libel was amended to set up the necessity of the repairs and to set up the bill of lading issued by the *Mary J. Leslie*. Upon the argument of these exceptions it was again held that a sufficient cause of action was not stated *(Record, fols. 6–8)*.

In January, 1889, the libel was further amended to allege that the funds had been supplied for the bottomry by the respondent *(Record, fol. 8)*. Again exceptions were filed, but before the same were brought on for argument the libellants again amended their libel to set up the fact, which had then just become known to the proctors, that the *Andrew Johnson* had not become a total loss at sea but had been sunk by the *Thirlmere*, and that the owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557, 9, 6 *(Record, fol. 10)*.

The libel as so amended is the one upon which the cause was tried in the District Court *(Amended libel, fol. 20–35)*.

The libellants, to maintain their cause of action, presented the depositions of the owner of the *Andrew Johnson (O'Brien, fols. 106–117)*, the master of the *Andrew Johnson (Killeran, fols. 76–84)* and witnesses in London and Hamburg *(Record, fols. 118–164)*.

The respondent called no witnesses in the District Court, but read one deposition of the master of the *Andrew Johnson* which had originally been taken by the libellants *(Killeran, fols. 196–198)*.

The libel was sustained upon the trial *(Opinion, fols 221–234)*, and it was ordered that the libellants "recover so much "of the moneys paid by them in satisfying the bottomry and "*respondentia* bond referred to in the libel as upon proper

"adjustment is properly chargeable to the owner of the ship "*Andrew Johnson* and her freight" *(Interlocutory Decree, fol.* 237*)*.

Reference was ordered to Special Commissioner to ascertain and compute such amount *(Interlocutory Decree, fol.* 237*)*. He found that the libellants were entitled to recover the principal sum of $6,091.73, for which sum, with interest and with costs a decree aggregating $9,598.94 was entered July 12th, 1894 *(Decree, fol.* 273*)*.

Upon appeal the United States Circuit Court of Appeals reversed the decree of the District Court and directed that the libel be dismissed upon the stated ground that the bottomry bond must be construed as falling due only upon the arrival of the *Andrew Johnson* in Hamburg, and that the *Andrew Johnson* must be deemed an "utter loss," although the circumstances attending her destruction gave to her owners a valuable right of recovery against the *Thirlmere*.

Without discussion of the other interesting questions which were submitted to Judges of the Circuit Court of Appeals, the petitioners urge that the grounds of the decision of that Court were erroneously taken and pray that a writ of *certiorari* issue directing the return of all the proceedings to this Court for review.

POINTS.

First.

THE BOND WAS ENFORCEABLE IN HAMBURG AGAINST THAT PORTION OF THE CARGO WHICH REACHED HAMBURG IN THE MARY J. LESLIE.

It is the general maritime principle that the lien of the bottomry bond attaches to and is enforceable against any salvage realized from the hypothecated property.

Maclachlan on Shipping, 3d Ed., p. 61; 4th Ed., p. 63.
Force vs. Prov. Wash. Ins. Co., 35 F. R., 767, 771.
Ins. Co. vs. Gossler, 96 U. S., 645, 652, 653.

Appleton vs. Crowinshield, 3d Mass., 464; 8th Mass., 343.
The Empusa, Law Rep., 5th Prob. Div., 6.

There can be no question but that the cargo arriving by the *Mary J. Leslie* was originally covered by the bond. The bond itself is explicit. The maker of the bond says:

"I bind myself, my heirs, executors or administrators, and "also the hull, boats, tackle, apparel and furniture of the said "vessel and her cargo of nitrate of soda, including about "twelve hundred tons of nitrate of soda, trans-shipped on board "the British bark *Mary J. Leslie*" *(Bond, fol. 40).*

The bond is later described as a

"present bond or obligation and hypothecation of the said "vessel, her boats and apparel, and her cargo, including that "portion of the cargo trans-shipped to the *Mary J. Leslie* and "the freight to be earned and become payable in respect of "the said voyage" *(Bond, fols. 44, 45).*

And, again:

"the said James H. Killeran doth by these presents mortgage, "hypothecate and charge the said vessels, her boats, tackle, "apparel and furniture, and her cargo, including that portion "of the cargo trans-shipped to the *Mary J. Leslie*, and the "freight to be earned and become payable in respect of the "said voyage" *(Bond, fol. 46).*

The bill of lading issued by the *Mary J. Leslie*, signed by her master, W. L. McLeod, recited that the cargo was shipped by J. H. Killeran, captain of the American ship *Andrew Johnson*, and bore this endorsement:

"The 8,449 bags of nitrate of soda as per this bill of lading, "are included in and jointly responsible with the nitrate of "soda specified in the Bottomry and Respondentia Bond given "to Messrs. Grace Bros. & Co. as security for the payment of "the American ship *Andrew Johnson's* disbursements in "Callao."

"Callao, 25th Sept, 1884.

"W. L. McLeod." *(Ex. B., fols. 53–56).*

It has been claimed, however, that the bond was made void by reason of the loss of the *Andrew Johnson.*

The provision was that the "obligation" should become void upon payment of the amount of the bond by the master of the *Andrew Johnson*.

"Or, if during the said voyage an *utter loss* of the said "vessel by fire, enemies, pirates, the perils of the sea or nav- "igation, or any other casualty, shall unavoidably happen to "be sufficiently proved by the said James H. Killeran" *(Bond, fol. 49)*.

We submit that the sinking of the *Andrew Johnson* by the *Thirlmere* at sea, and the consequent nonarrival of the *Andrew Johnson* in Hamburg, did not void the bond as against the cargo which arrived by the *Mary J. Leslie*.

A. Even if the *Andrew Johnson* had proved an "utter loss," the bond would not be forfeited thereby; for the words "said vessel" in the defeasance clause relate, clumsily perhaps, but clearly, to either the *Andrew Johnson* or the *Mary J. Leslie*.

The instrument should be construed liberally.

Abbott on Shipping, 12th Ed., p. 112.

a. The same words, "said vessel" are used earlier in the defeasance or condition clause in this connection:

"Now, the condition of this obligation is such, that if the "said vessel shall forthwith set sail from Callao aforesaid, and "without unnecessary delay or deviation proceed on her in- "tended voyage to Hamburg, and if the above bounden James "H. Killeran shall and do within the space of five days next "after the arrival of the vessel at her final port of destination, "and *before commencing to discharge the cargo* * * * well "and truly pay or cause to be paid, &c., &c., &c." *(Bond, fols. 46, 47)*.

Here the words "the said vessel" clearly relate to both the *Andrew Johnson* and the *Mary J. Leslie*, for it is apparent that it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamburg earlier than the *Andrew Johnson*, she should lie in Hamburg "before com- "mencing to discharge the cargo" pending the possible arrival of the *Andrew Johnson*.

If "the said vessel," in the earlier part of the defeasance clause, refers to each of the two vessels, then it certainly must

carry the same meaning when next used in a later position in the same clause.

b. Only by such construction can due effect be given to the intention of the parties.

It was clearly the purpose of the parties to the bond that whatever got through to Hamburg, whether the *Andrew Johnson*, or whether the *Andrew Johnson's* cargo, or whether the *Mary J. Leslie's* cargo, should be held to pay the bond.

The *Andrew Johnson* herself was worth $60,000 *(O'Brien, fol. 109; Killeran, fol. 197).*

The major part of her cargo remained on board of her and was worth nearly $50,000.

It is apparent, therefore, that the *Andrew Johnson* and the cargo on board of her were amply sufficient to protect the bond, being nearly ten times the amount of the bond, if the parties had intended to limit their security to the one bottom of the *Andrew Johnson.*

Though the security was enormous in amount, the parties apparently were not content to rely upon one bottom, and therefore included the cargo of the *Mary J. Leslie*, which was worth about $40,000 *(Wirtz, fol. 146).*

If the *Andrew Johnson* and her cargo and freight had ever reached Hamburg, the security afforded by them was so ample that the bondholder would have no occasion to look to the cargo on the *Mary J. Leslie.*

We must assume, therefore, that the cargo on board the *Mary J. Leslie* was subjected to the bond in order that the bondholder would have security even though the *Andrew Johnson* and her remaining cargo did not reach destination.

c. The learned District Judge accordingly construed the bond as enforceable against the cargo arriving by the *Mary J. Leslie.* He did this at a time when the question came before him on exceptions to the libel, at which time it was supposed by him that the *Andrew Johnson* had become an "utter loss" *(Opinion, fols. 207–212).*

It is significant that, since the Court so interpreted the bond, both the master and the owner of the *Andrew Johnson* have been called as witnesses, and neither of them has sug-

gested that there was any intention to make the bond depend upon the arrival of the *Andrew Johnson* at Hamburg.

This question was passed upon, too, by the Hamburg counsel of the bondholders and of the cargo-owners, to whom the question of the liability of the *Mary J. Leslie's* cargo was submitted. They said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination, but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention "of the contracting parties, and that the wording referred to "has originated in the not sufficiently careful use and employ- "ment of a form of bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "bottomry bond were interpreted in this manner, the cargo of "the *Mary J. Leslie* would be entirely liberated, after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the bottomry debt, which nevertheless has arisen "out of a case of general average. Manifestly this cannot "have been the intention of the parties interested (*Report*, "*fols. 157, 158*).

B. In fact, moreover, the *Andrew Johnson* did not become an "utter loss."

She went to the bottom of the sea as the result of the collision with the *Thirlmere*; but that fact did not render the owner's interest in her valueless, for the very circumstances which sent her to the bottom gave to him a claim for the value of his vessel and freight against the *Thirlmere*. For that value and to the limit of that value, if necessary, he must account to persons having claims against the vessel or against himself, based upon the events of the voyage.

We are well aware, of course, that the shipowner is not obliged to account for his insurance moneys; but the language of the Supreme Court, in relieving the owner from accounting for insurance, clearly indicates that he would have to account for moneys received by him, not upon an independent contract of insurance, but based upon the ownership of the vessel.

City of Norwich, 118 U. S., 468, 493, 503, 504.

The object of granting limitation of liability at all is to

enable merchants to invest money in ships without subjecting them to "an indefinite hazard of losing their whole property " by the negligence or misconduct of the master or crew; but " only subjecting them to the loss of their investment."

The Court held that if a merchant wanted to contract with an insurance company for indemnity against even the loss of his investment, he should be permitted to do so *(p. 504)*.

When a right of recovery exists, however, based not upon an independent contract of insurance, but upon the very loss itself by regular operation of law, because of ownership in the vessel, and not because of an independent contract, the case is different. Then a recovery is, in effect, the vessel or the freight which it represents; and such vessel and freight is not an " utter loss." The shipowner hazards nothing beyond " the loss of his investment."

The right of recovery which came to the owner of the *Andrew Johnson* by reason of the sinking of his vessel, was valuable. He presented it in the courts of Great Britain and received £5179-13-6 on account of his freight vessel, and £858-6-11 on account of his freight *(O'Brien, fol. 114)*. He did not recover full payment only because the *Thirlmere* was insufficient in value to pay all losses, and, under the operation of the British statutes for limitation of liability, paid only a dividend.

C. The payment by the libellants of the bond was substantially a forced payment.

The *Mary J. Leslie* arrived in Hamburg, February 5th. The nitrate of soda had been shipped in the name of the master of the *Andrew Johnson* and subject to the terms and conditions of the *Andrew Johnson's* original charter party, as and be- " ing included in and jointly responsible with the nitrate of soda " specified in the Bottomry and Respondentia Bond given to " Messrs. Grace Bros. & Company as security for the payment " of the *Andrew Johnson's* disbursements in Callao. *(Bill of Lading, Ex. 7)*.

By the terms of the bond it fell due February 10th, five days after arrival in Hamburg, and on that date formal demand was made by a notary *(Stockfleth, fol. 141)*.

No discharge of the cargo was made meantime, nor was any permitted until after arrangements had been affected between

Antony Gibbs & Sons and Baring Brothers & Company to secure the payment of the bond.

On the 11th of February, in order to secure the release of the cargo Antony Gibbs & Sons gave a formal written engagement to Baring Brothers & Company to pay "whatever pro-"portion of the said Bottomry and Respondentia Bond may "be found to be legally due from the said cargo" *(Sillem, fol. 121, Exh. A, fols. 125, 126)*. This engagement having been accepted by Baring Brothers & Company, the discharge began *(Wirtz, fols. 144, 145)*.

Immediate steps were taken to ascertain the law, and it was under the advice of eminent lawyers representing each party that the amount of the bond was paid *(Wirtz, fol. 145; Wolffson, fols. 151, 152, 155-158; Stammann, fols. 162, 163)*.

Second.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE LOSS OF THE ANDREW JOHNSON DEFEATED THE BOND AND DEPRIVED THE BONDHOLDER OF ALL RIGHT OF SALVAGE.

Significance should attach to the use of the word "utter." It is a word of extreme meaning and conveys to the mind a different idea than does the word "total."

It is common to hear of total losses in insurance law; but the phrase has grown to have such a limited meaning that now, when it is the intention of parties to condition the insurance upon the complete destruction of the property insured, it is necessary to use the words "absolute total loss."

In construing this bond it must be assumed that the parties used the words "utter loss" advisedly, as meaning a more complete disappearance of the pledged property than would be signified even by the words "total loss." The *Andrew Johnson* was not an utter loss, inasmuch as there remained to her owner a valuable right of action against the *Thirlmere*.

The condition of the bond is not, as was apparently assumed by the Circuit Court of Appeals, that the *Andrew Johnson*

should arrive in Hamburg; but the condition is that if there should be "an utter loss" then the bond should become void.

Assume for the moment that the words relate strictly to the *Andrew Johnson* and not to any other property pledged. They even in that case convey the right of the bondholder to all salvage. The cargo arriving on the *Mary J. Leslie* would rank as salvage.

It is not necessary to express a salvage clause in a bond in order to give to the bondholder the benefit of salvage.

"If the ship ceases to be a ship by reason of unavoidable "sea perils, the bondholders' lien attaches to the salvage, if "there be any."

Maclachlan on Merchant's Shipping, 4th Ed., p. 63.
Force vs. Prov. & Wash. Ins. Co., 35 Fed. Rep., 767, 771.

"If the ship was once bottomried, the bond attached to "the very last plank, and the holder might have that sold for "his benefit."

The Catherine, 15 Jurist, 231, 232.

The true meaning of the defeasance clause is that, in the event of the property being damaged or in part destroyed by sea perils, the bondholder's rights are limited to the value of such property as may be saved, and that he has no remedy against the master or owner of the vessel personally for the stipulated amount of the bond, a right which he would have if the property had been destroyed or diverted by the deliberate intention of the master or owner.

The Catherine, supra.

It must have been contemplated by the parties that their respective rights would be determined by the law of Hamburg, at which place payment of the bond was stipulated to be made.

By the German Commercial Code it is provided that:

"All the bottomry objects are jointly and severally liable "to the bottomry creditor."

Article 692, Record, fol. 177.

And again:

"In case the bottomried objects become, by reason of gen- "eral or particular average, insufficient for the payment of the "bottomry creditor, he shall bear the loss thereby caused."

Article 691, Record, fol. 177.

The German law, in thus specifically providing that in the event of the partial destruction of the bottomried objects the lender shall be limited to the property surviving, just as clearly establishes by implication that the bottomry lender is entitled to look for relief to the property surviving.

The fact that the vessel does not, through sea perils, reach her port of destination, merely relieves the master and ship owner from the measure of personal responsibility that would attach to them if her non-arrival was due to their voluntary action.

The Great Pacific L. R., 2 Adm. & Ecc., 381.
The Catherine, 15 Jurist, 231.
The Draco, 2 Sumner, 157.

Third.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS WITHOUT PRECEDENT TO SUSTAIN IT.

The learned Judges say:

"No doubt damages recovered for the tortious act of a "colliding vessel are often treated in admiralty as a substitute "for the destroyed vessel. But the hazard taken by the "bottomry bondholder is the physical survival of the ship, or "at most of any salvage from her. When she goes to the "bottom with all she holds, there is an utter loss within the "meaning of the contract of bottomry, and the bond goes down "with the vessel."

We submit that, it being the practice of the Courts of Admiralty to treat damages recovered for the tortious act of a colliding vessel as a substitute for the destroyed vessel, such damages or right to damages constitutes salvage.

No authority is cited to show that such a loss is an "utter loss" within the meaning of a contract of bottomry, and such a doctrine is certainly inconsistent with the doctrine that the damages may be taken to represent the destroyed vessel.

Even if the damages so recoverable are not a *res* that can be proceeded against by the bondholder, still the fact of the

existence of the right to such damages relieves the situation from being one of "utter loss," and prevents the bond becoming void.

If there is not an "utter loss," then the bond is not rendered void, and is certainly operative upon all surviving pledged property.

German Commercial Code, Arts. 691, 692.
Record, fol. 177.

It should be borne in mind that this action is not one for the enforcement of the bond, but that it is an action brought by the owner of cargo, who has upon demand and under the advice of eminent counsel paid the entire bond in the belief that he was legally bound to make such payment, to enforce contribution from the shipowner for his proportionate share of the expenses for which the bond was given.

The only question is whether the bond was enforceable or whether it was void as against the cargo arriving in Hamburg on the *Mary J. Leslie*, either as salvage or otherwise.

Fourth.

THE BOND, BEING VALID AS AGAINST THE CARGO, AND ENFORCEABLE AGAINST THAT PORTION OF THE CARGO ARRIVING IN HAMBURG ON THE MARY J. LESLIE, THE LIBELLANTS, HAVING PAID THE BOND, ARE ENTITLED TO RECOVER FROM THE SHIP-OWNER HIS PROPORTION OF THE EXPENSES INCURRED AT CALLAO.

The expenses at Callao grew out of the distress into which the *Andrew Johnson* fell at sea. Some of them were properly chargeable upon the ship alone, some upon the ship-owner alone, some upon the cargo alone, and some upon all interests.

They might have been paid at the time by the respective parties or by either of the parties; but, in accordance with custom, it is usual to make the assessment or distribution or contribution at the end of the voyage.

If the ship owner had paid the expenses at Callao, or if he had taken up the bond at Hamburg, he would have reimbursed

himself through a statement and adjustment of general average for such portion of the expenses as was properly chargeable upon the cargo, taking from the cargo on discharge a general average bond.

The owner neither paid the expenses at Callao, nor did he take up the bond; but left payment upon the bond to be enforced from the owner of the cargo.

The owner of the cargo having paid all charges is legally entitled to contribution upon a proper statement and adjustment.

Benson vs. Duncan, 1 Exch., 537; 3 Exch., 644.
Appleton vs. Crowninshield, 8 Mass., 340, 360.

The principle was fully recognized by Chief-Justice TANEY, though in the case then under consideration he relieved the ship owner from further payment, upon the ground of limitation of the ship owner's liability, the vessel in that case having been already exhausted by the bond.

Naylor vs. Baltzell, Taney's Decisions, 55.

The owner of the *Andrew Johnson*, however, did not lose his vessel. Aside from the reimbursement through insurance, with which we have nothing to do, he received from the proceeds of the *Thirlmere*, on account of his vessel, £5,178-13-6, and on account of her freight £858-6-11 *(O'Brien, fol. 144)*. These figures represent "the amount or value of the interest "of such owner in such vessel, and her freight then pending," which is established by statute to be the limitation of the shipowner's liability.

U. S. Revised Statutes, Sec. 4283.

Every equity is with the libellants.

By the exigencies of the voyage they have been forced to pay the expenses which should have been paid by the shipowner—expenses which, in fact, repaired and preserved the shipowner's property and gave to it at least some part of the value for which compensation was made to him by the *Thirlmere*.

Fifth.

IT IS A MATTER OF GREAT COMMERCIAL INTEREST THAT THIS COURT SHOULD DECLARE THE MEASURE OF A SHIPOWNER'S LIABILITY WHEN THE DESTRUCTION OF HIS VESSEL HAS OCCURRED UNDER SUCH CIRCUMSTANCES AS TO CREATE A VALUABLE RIGHT OF RECOVERY AGAINST A WRONGDOER.

This question has never been passed upon by this Court. The question nearest to it is the discussion of the Court in the case of *The City of Norwich, 118 U. S., 468, 493, 503, 504.*

In that case it was determined that a shipowner cannot be called upon after the loss of his vessel to surrender the insurance moneys received by him by virtue of independent contracts of insurance, in order to secure the relief of limitation of liability.

The decision was based specifically upon the fact that contracts of insurance were independently made by the shipowner and had nothing to do with the engagements made or the liabilities incurred by him in respect to the voyage.

The implication is strong from the reasoning of the Court that he would be compelled, however, to account for the value of the right coming to him, not by virtue of any independent contract, but solely by reason of his ownership in the vessel.

Certainly, if this is so, the *Andrew Johnson* was not an "utter loss" within the meaning of the bottomry bond.

Just as the decision in the case of the *City of Norwich* settled forever the questions that disturbed ship owners respecting the status of insurance moneys, so will a decision of this Court in this case settle a question fully as important.

The decree of the District Court, including interest to this date, exceeds $10,000, and therefore important property rights, as well as novel questions of law, are involved.

Sixth.

A WRIT OF CERTIORARI SHOULD BE GRANTED, DIRECTED TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT, COMMANDING THEM FORTHWITH TO CERTIFY AND RETURN TO THIS COURT ALL OF THE PROCEEDINGS BY THEM HAD IN THIS ACTION.

BUTLER, STILLMAN & HUBBARD,
Proctors for Petitioners.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT OF THE UNITED STATES.

No. 497.

MARSHALL LOWE, JOHN JEROME GRAY and ALFRED TAYLOR,

Petitioners and Appellants,

against

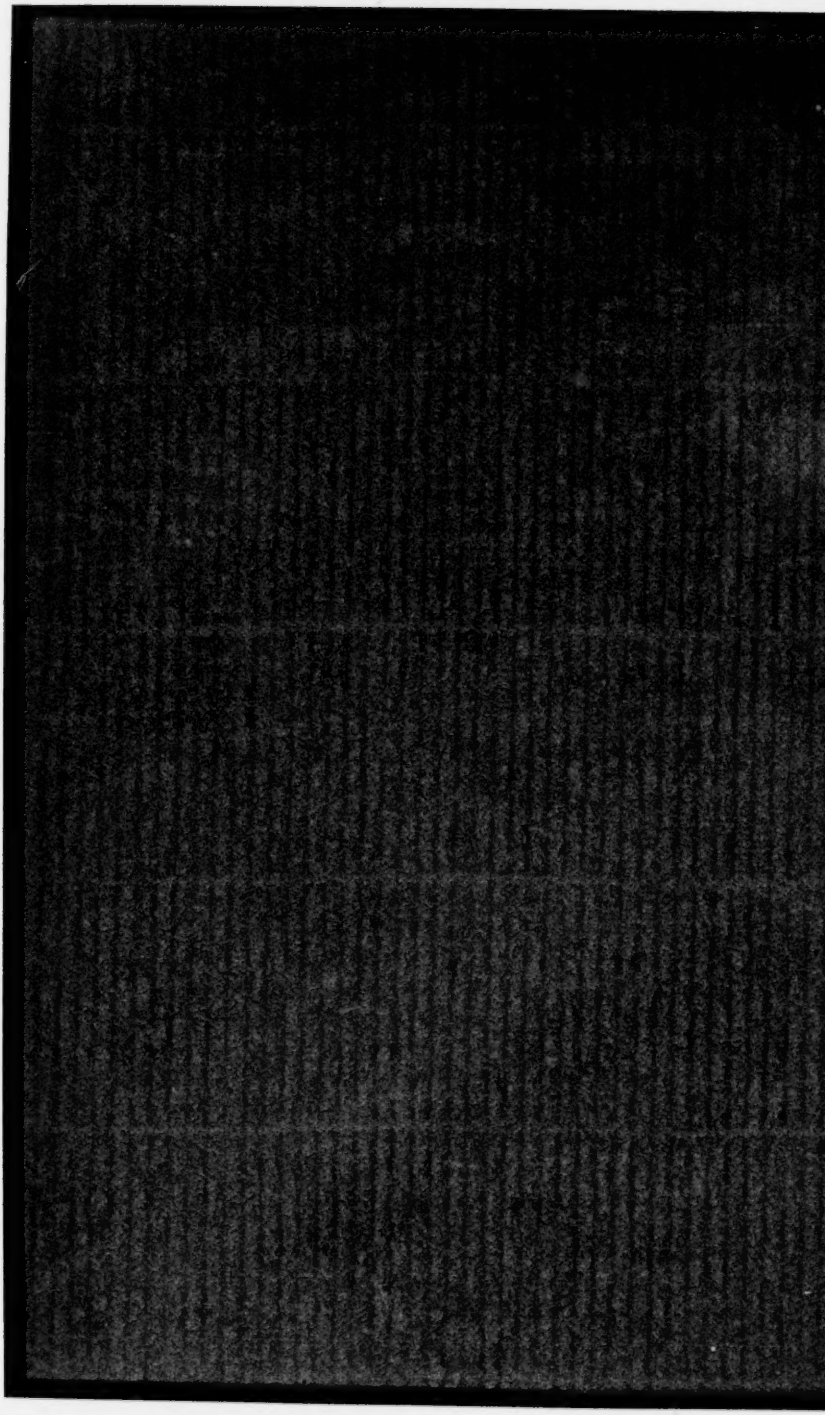
EDWARD T. O'DEA,

Respondent.

Brief for Appellants.

BUTLER, NORMAN, JOLINE & MYERSE,

Proctors for Petitioners, Appellants.



Supreme Court of the United States.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR, *Libellants and Appellants,* *against* EDWARD E. O'BRIEN, *Respondent.*	No. 266, October Term, 1896.

BRIEF FOR LIBELLANTS AND APPELLANTS.

This action comes before this Court under a writ of *certiorari* issued May 7th 1895 to the Judges of the United States Circuit Court of Appeals for the Second Circuit *(Record p. 66)*.

The action was originally instituted in the District Court of the United States for the Southern District of New York, by the libellants, composing the firm of Gibbs & Company, of Valparaiso, Chili, owners of a shipment of nitrate of soda, against the respondent as owner of the ship *Andrew Johnson*, to enforce contribution to expenses incurred in Callao, Peru, which expenses had been paid by the libellants through a bottomry and respondentia bond affecting their cargo.

Statement of Facts.

In June and July, 1884, the libellants shipped on board the *Andrew Johnson*, at Iquique Bay, 10,399 bags of nitrate of soda, and at Caleta Buena 9,544 bags of nitrate of soda, to

be transported by said vessel to Hamburg, Germany, and there to be delivered to the order of Antony Gibbs & Sons, of London *(Exhibits 1, 2 and 3, pp. 18, 19)*.

On the 15th of July the ship sailed with all this cargo from her last loading port, Caleta Buena, for Hamburg, and soon thereafter met with heavy weather and with disaster, and necessarily sought a port of refuge *(Killeran, p. 16)*.

She went into Callao, and her condition was such that she could not prudently continue her voyage without repairs *(Answer, p. 12; Killeran, p. 16)*.

A survey was held August 4th, by which it was found that certain butts and seams at the water's edge were very soft, and that water had entered in considerable quantities from the top sides, though she was making comparatively little water while lying in port. The surveyors recommended that she be lightened of cargo until her upper sheets of metal were out of water for further examination *(First Survey, Ex. 4, pp. 19, 20)*.

After the vessel had been lightened by the discharge of 900 tons of cargo she was further examined August 24th. The surveyors recommended that the top sides and water ways be horsed and caulked and the main decks caulked from foremast forward, the hood ends carefully overhauled, re-fastened where necessary and well caulked. They further recommended that at least 1,200 tons of the cargo be forwarded in another bottom, and reported that with the above repairs and thus lightened the *Andrew Johnson* could proceed on her voyage with safety. This they said they considered to be in the interest of both the owners of ship and cargo *(Second Survey, Ex. 5, pp. 20, 21)*.

The final survey was held September 10th. in which the surveyors reported that the repairs ordered by them had been well executed, the top sides had been horsed and caulked, the several hood ends re-fastened, the main deck forward re-caulked and two new bilge pumps supplied; that the cargo remaining on board had been well stowed and carefully distributed, and that the vessel was making no water *(Third Survey, Ex. 6, p. 22)*.

The master of the *Andrew Johnson*, in accordance with the recommendations of the second survey, shipped 8,449 bags of his cargo, weighing about 1,130 tons, upon another vessel, the *Mary J. Leslie (Killeran, p. 17)*.

This shipment was made in the name of J. H. Killeran as master, and the bill of lading bore the following endorsement signed W. H. McLeod, master of the *Mary J. Leslie :*

" The 8,449 bags of nitrate of soda as per this bill of lading " are included in and jointly responsible with the nitrate of " soda specified in the bottomry and respondentia bond given " to Messrs. Grace Bros. & Co. as security for payment of the " American ship *Andrew Johnson's* disbursements in Callao."
Ex. 7, p. 17 ; Ex. B, p. 11.

For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment and stowage of cargo, the master incurred serious expenses *(Amended Libel, p. 5 ; Answer, p. 12 ; Bond, p. 9).*

The vouchers for these expenses have been proved and show an aggregate of 13,237.72 Peruvian soles, equivalent to £2,212, 5, 9 *(Vouchers, p. 18 ; Answer, p. 12).*

In order to raise funds to meet these expenses the master made a bottomry and respondentia bond in favor of Grace Brothers & Co., bearing date September 15th, 1884, for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599, 8, 9 *(Killeran, p. 17 ; Bond, pp. 8–10)* or about $12,500. Grace Bros. & Co. appear to have been general agents for the respondent, though there is no proof that they advanced upon the bottomry bond as agents *(Ex. 3, p. 19 ; O'Brien, p. 23).*

For the payment of the bond the master bound, obligated and hypothecated the *Andrew Johnson* and her cargo " includ- " ing that portion of the cargo transhipped to the *Mary J.* " *Leslie*," and the freight *(Bond, p. 9).*

The payment was conditioned that the vessel should set sail from Callao and proceed to Hamburg and pay the bond within five days after arrival at her final port of destination and " before commencing to discharge the cargo," free of any average, and with the provision that, if during the voyage there should be " *an utter loss* " of said vessel, the bond should be void, and otherwise be and remain in full force and virtue *(Bond, p. 10).*

Thereupon the two vessels, the *Andrew Johnson* and the *Mary J. Leslie*, sailed from Callao for Hamburg carrying their respective lots of cargo.

The value of the *Andrew Johnson* was about $60,000, the value of her freight was $20,000, and the value of the cargo remaining on board of her about $50,000. The value of the cargo transshipped to the *Mary J. Leslie* was about $40,000.

The *Andrew Johnson* met collision with the British ship *Thirlmere* and was sunk in mid-ocean *(Killeran, p. 18)*.

The *Mary J. Leslie* arrived in regular course at Hamburg on February 5th, 1885 *(Wirtz, p. 30)*. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg *(Wirtz, p. 30)*.

On the 10th of February formal demand was made upon Mr. Wirtz for the payment of the bond by Herman Stockfleth, notary, acting on behalf of Berenberg, Gossler & Co., bankers *(Stockfleth, p. 30; Wirtz, p. 30)*.

Berenberg, Gossler & Co. represented Baring Brothers & Co. of London, who in turn represented the owners of the bond *(Sillem, p. 26; Wirtz, p. 30)*.

No cargo had up to the time of formal demand been discharged from the *Mary J. Leslie*, and by the terms of the bond and under the provisions of the German law it could not be discharged until the bond was paid or payment secured *(Bond, p. 10; German Commercial Code, Article 695, p. 37)*.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave the following obligation to Baring Brothers & Co.:

"In consideration of your telegraphing Messrs. J. Beren-
"berg, Gossler & Co., Hamburg, to withdraw their claim on
"your behalf in respect of bottomry and respondentia on the
"cargo of nitrate of soda to our order arrived by the British
"vessel *Mary J. Leslie*, we hereby engage to pay you whatever
"proportion of the said bottomry and respondentia bond may
"be found to be legally due from the said cargo, the question
"to be submitted to Messrs. Waltons, Bubb & Waltons and
"Messrs. William Richards & Son in London, or if it be found
"to be governed by Hamburg law, to equally competent au-
"thorities there to be appointed by your agents and ours"
(Sillem, p. 26; Ex. A, pp. 26, 27).

This engagement of Antony Gibbs & Sons was accepted the same day by Baring Brothers & Co., as follows:

"With reference to your letter of this date we understand
"your guaranty to be equally binding should the case be de-

" cided to be governed by Hamburg law, and shall accordingly " telegraph our friends in Hamburg to release the cargo of the " *Mary J. Leslie.*"

Sillem, p. 26 ; Exhibit B, p. 27.

Thereupon the discharge of the cargo was commenced and was completed February 27th (*Wirtz, p. 31*).

In order to determine the amount legally due to the bond-holders from that portion of the cargo transported on the *Mary J. Leslie* Berenberg, Gossler & Co. and Hugo Wirtz, representing respectively Baring Brothers & Co. and Antony Gibbs & Sons, appointed Dr. Wolffson and Dr. Stammann, " eminent and leading lawyers of Hamburg " ; and these gentlemen, after full consideration, decided that the cargo on board the *Mary J. Leslie* was liable to the extent of its value for the whole of the bond *(Sillem, p. 26 ; Wirtz, p. 30).*

The value of that portion of the cargo was about $40,000, and therefore far in excess of the amount of the bond *(Wirtz, p. 31).*

Dr. Stammann and Dr. Wolffson gave their opinion March 14th *(Record, p. 33)* as follows :

" HAMBURG, 14 March, 1885.

" HUGO WIRTZ, ESQRE.

" MESSRS. J. BERENBERG, GOSSLER & CO.

" We formulate the question which you, in the names of " Messrs. Antony Gibbs & Sons and Messrs. Baring Brothers " & Co. have submitted to our judgment, as follows :

" ' Whether the portion of the cargo of nitrate of soda of the " ' *Andrew Johnson* brought home per *Mary J. Leslie* is liable " ' for the whole amount of the bottomry bond which was " ' signed in Callao, and whether, consequently, the receiver of " ' this portion of the cargo has to pay the whole of the bot- " ' tomry bond, provided the value of this portion of the cargo " ' is not less than the amount of the bottomry debt ?

" This question we must answer in the affirmative, because " according to the law here, ship, freight and cargo of the " *Andrew Johnson*, as well as the portion of the cargo which " was transhipped into the *Mary J. Leslie* are jointly liable " for the whole amount raised on bottomry at Callao, and, " therefore the *Andrew Johnson* and her cargo having become " a total loss, the holder of the bottomry bond can come upon

" that portion of the cagro which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim.

" Some doubt might be raised as to whether, according to
" the wording of the bottomry bond, the money was not lent,
" or appear to be lent contingent upon the safety of the *An-*
" *drew Johnson*, and becoming due only after her arrival at her
" port of destination; but becoming null and void in the event
" of her non-arrival. We are of opinion, however, that this in-
" terpretation is not consistent with the real intention of the
" contracting parties, and that the wording referred to has
" originated in the not sufficiently careful use and employment
" of a form of bond which happened to be at hand. This
" seems the less doubtful to us for this reason, that if the
" bottomry bond were interpreted in this manner the cargo of
" the *Mary J. Leslie* would be entirely liberated after the loss
" of the *Andrew Johnson* occurred, and would not even bear a
" portion of the bottomry debt, which, nevertheless, has
" arisen out of a case of general average. Manifestly this
" cannot have been the intention of the parties interested.

" Yours truly,
" J. Otto Stammann.
" J. Wolffson."

The result was at once communicated to London, and on March 17th, 1885, Antony Gibbs & Sons paid to Baring Brothers & Co. the full sum of £2,592, 7, 9 *(Sillem, p. 26)*.

Suit was brought by the owners of the *Andrew Johnson* against the owners of the *Thirlmere* in England to recover damages for the loss of his vessel by collision, valuing the vessel at $60,000 *(O'Brien, pp. 23, 24)*. The owners of the *Thirlmere* limited their liability under the provisions of the British Act to £8-0 Sterling per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the *Andrew Johnson* received £5,179, 13, 6 on account of the loss of his ship and £858, 6, 11 on account of her freight *(O'Brien, p. 24)*. The libellants herein recovered in that proceeding in respect to that portion of their cargo which sank with the *Andrew Johnson (Record, p. 58)*.

After the payment of the bond by the libellants in Hamburg they caused an adjustment to be made in London by William Richards & Sons, average adjusters to show what portion of the expenses covered by the bond were properly chargeable against the owner of the *Andrew Johnson* either as gen-

eral or special charges, and what portion against the owners of the cargo *(Richards, pp. 27, 28)*.

Then and in July, 1887, this action was instituted by the libellants, claiming to recover from the owner of the *Andrew Johnson* the share of general and special charges properly falling upon the vessel, and which had been paid by the funds raised on bottomry.

In that libel it was alleged, though an error of the pleader, that the *Andrew Johnson* and her freight had become a total loss.

Exceptions were filed to the sufficiency of the libel, and argument was had thereon in April 1888 before the District Judge. Under the general exception that no cause of action was stated, it was urged (1st) that under the peculiar terms of the bond, the bond became void upon the loss of the *Andrew Johnson;* and (2nd) that the liability of the ship owner, being limited to his interest in the vessel and freight, was *nil*.

The District Judge found that the bond was not rendered void, so far as the cargo delivered in Hamburg was concerned, by reason of the loss of the *Andrew Johnson;* but held that the libel stated no cause of action against the ship owner because its allegations showed that vessel and freight had become a total loss, and the ship owner was thereby absolved from liability. *(Opinion, pp. 41-45)*.

Thereupon the libel was amended to set up the necessity of the repairs and to set up the bill of lading issued by the *Mary J. Leslie*. Upon the argument of these exceptions it was again held that a sufficient cause of action was not stated *(Record, p. 2)*.

In January, 1889, the libel was further amended to allege that the funds had been supplied for the bottomry by the respondent *(Record, p. 2)*. Again exceptions were filed, but before the same were brought on for argument the libellants again amended their libel to set up the fact, which had then just become known to the proctors, that the *Andrew Johnson* had not become a total loss at sea but had been sunk by the *Thirlmere*, and that the owner of the *Andrew Johnson* had recovered by legal proceedings against the *Thirlmere* in Great Britain the sum of £6,557, 9, 6 *(Record, p. 2)*.

The libel as so amended is the one upon which the cause was tried in the District Court *(Amended libel, pp. 4-7)*.

The libellants, to maintain their cause of action, presented the depositions of the owner of the *Andrew Johnson (O'Brien, pp. 22-25)*, the master of the *Andrew Johnson (Killeran, pp. 15-18)* and witnesses in London and Hamburg *(Record, pp. 25-40)*.

The respondent called no witnesses in the District Court, but read one deposition of the master of the *Andrew Johnson* which had originally been taken by the libellants *(Killeran, p. 40)*.

The libel was sustained upon the trial *(Opinion, pp. 45-48)*, upon the grounds heretofore noted and upon the further ground that the bottomry lender's lien attached to all salvage *(Opinion, pp. 46, 47)*, and it was ordered that the libellants "recover so much of the moneys paid by them in satisfying "the bottomry and *respondentia* bond referred to in the libel "as upon proper adjustment is properly chargeable to the "owner of the ship *Andrew Johnson* and her freight" *(Interlocutory Decree, p 48)*.

Reference was ordered to a Special Commissioner to ascertain and compute such amount *(Interlocutory Decree, p. 48)*. He found that the libellants were entitled to recover the principal sum of $6,091.73, for which sum, with interest and with costs, a decree aggregating $9,598.94 was entered July 12th, 1894 *(Decree, pp. 55, 56)*.

Upon appeal the United States Circuit Court of Appeals reversed the decree of the District Court and directed that the libel be dismissed upon the stated grounds that the bottomry bond must be construed as falling due only upon the arrival of the *Andrew Johnson* in Hamburg, that the *Andrew Johnson* must be deemed an "utter loss," although the circumstances attending her destruction gave to her owners a valuable right of recovery against the *Thirlmere (Opinion, pp. 58-65; Decree pp. 67, 68)*, and that the payment of the bond by the owners of the cargo in Hamburg was a voluntary payment through which they acquired no rights against the shipowner.

Opinion, pp. 58-65; Decree, pp. 67, 68.

The libellants thereupon filed their petition in this Court for a writ of *certiorari*, which writ was granted May 7th, 1895 *(Record, p. 66)*.

POINTS.

First.

THE BOND WAS ENFORCEABLE IN HAMBURG AGAINST THE PORTION OF THE CARGO WHICH REACHED HAMBURG IN THE MARY J. LESLIE.

The cargo arriving by the *Mary J. Leslie* was originally covered by the bond. The bond itself is explicit. The maker of the bond says:

> " I bind myself, my heirs, executors or administrators, and " also the hull, boats, tackle, apparel and furniture of the said " vessel and her cargo of nitrate of soda, including about " twelve hundred tons of nitrate of soda, transhipped on board " the British bark *Mary J. Leslie*" *(Bond, p. 8)*.

The bond is later described as a

> " present bond or obligation and hypothecation of the said " vessel, her boats and apparel, and her cargo, including that " portion of the cargo transhipped to the *Mary J. Leslie*, and " the freight to be earned and become payable in respect of " the said voyage" *(Bond, p. 9)*.

And, again:

> " the said James H. Killeran doth by these presents mortgage, " hypothecate and charge the said vessel, her boats, tackle, " apparel and furniture, and her cargo including that portion " of the cargo transhipped to the *Mary J. Leslie*, and the " freight to be earned and become payable in respect of the " said voyage" *(Bond, p. 9)*.

The bill of lading issued by the *Mary J. Leslie*, signed by her master, W. L. MacLeod, recited that the cargo was shipped by J. H. Killeran, captain of the American ship *Andrew Johnson*, and bore this endorsement:

" The 8,449 bags of nitrate of soda as per this bill of lading,
" are included in and jointly responsible with the nitrate of
" soda specified in the bottomry and respondentia bond given
" to Messrs. Grace Bros. & Co. as security for the payment
" of the American ship *Andrew Johnson's* disbursements in
" Callao."

" Callao, 25th Sept., 1884.

W. L. MacLeod." *(Ex. B., p. 11).*

This portion of the cargo having been thus subjected specifically to the bond, how can it be said to have been relieved of the lien?

It has been claimed that the bond was made void by reason of the loss of the *Andrew Johnson.*

A. It is a general maritime principle that the lien of the bottomry bond attaches to and is enforceable against any salvage realized from the hypothecated property.

Even though it be considered that the *Andrew Johnson* and the cargo remaining on board of her became an " utter loss," still that portion of the cargo which arrived in Hamburg must be treated as salvage applicable to the payment of the bond.

This principle of the right of the bottomry lender to resort to salvage, whenever and wherever found, upon the breaking up of the voyage upon which the bond was conditioned, does not belong to merely local Hamburg law but is a part of the general maritime law of the world.

The decision of Dr. Stammann and Dr. Wolffson clearly states the law in Hamburg upon this point:

" According to the law here, ship, freight and cargo of the
" *Andrew Johnson*, as well as the portion of the cargo which
" was transhipped into the *Mary J. Leslie*, are jointly liable
" for the whole amount raised on bottomry at Callao, and,
" therefore, the *Andrew Johnson* and her cargo having become
" a total loss, the holder of the bottomry bond can come upon
" that portion of the cargo which was shipped by the *Mary J.*
" *Leslie* for the whole amount of his claim."

Record, p. 33.

This opinion is concurred in by two other Hamburg counsel, Mr. Schroeder and Mr. Nolte *(pp. 29, 31)*, and no different opinion has been expressed by any witness.

It is in strict accord with the Commercial Code of Germany, which provides:

"Art. 691. A bottomry creditor is not liable to contribute "to general or particular average. In case, however, *the bot-* "*tomried objects* become, by reason of general or particular "average, insufficient for the payment of the bottomry creditor, "he shall bear the loss thereby caused."

"Art. 692. All the *bottomried objects* are jointly and sever- "ally liable to the bottomry creditor. After the arrival of the "vessel at the port of destination of the bottomry voyage, "the creditor can apply for an arrest of all bottomried ob- "jects, even before his claim becomes due.

"Art. 699. * * * When the bottomry voyage does not "terminate in the port of destination, but in another port, the "bottomry debt must be paid in the latter port without de- "duction from the premium, after the expiration of the stipu- "lated time for payment, or, in default of an agreement, after "the expiration of eight days; such time of payment to be "calculated from the definite abandonment."

German Commercial Code, Arts. 691, 692, 699; Record, pp. 37, 38.

It is to be noted that, under article 691 the bottomry lender's security is diminished not merely by physicial deterioration and loss of the bottomried objects, but by the reduction of their value through general average charges.

Hamburg was the port of destination named in the bond, and the cargo transported by the *Mary J. Leslie* was within the jurisdiction of the Hamburg courts, so that it was there subject to any action that might be instituted by the bondholder. It may be said therefore that the law of Germany, even if such law had been peculiar to that nation, was the law measuring the rights of the bondholder.

But the law giving to the bottomry lender a remedy against any salvage from bottombried objects, was not peculiar to Germany.

It is the general maritime law, and finds expression now in the codes of all the continental countries of Europe and South America, and is recognized by the courts and the elementary writers of this country. In England alone has any question arisen as to the validity of the principle.

The Sea Laws of France, promulgated in August 1681, provide:

"XI. All contracts of bottomry shall be null *after the entire* "*loss of the effects* upon which the money was lent, if that "happens by accident and within the time and places therein "expressed."

"XII. Nothing shall be reputed accident that is occasioned "by the vice of the things themselves, or by the fault of the "owners, master or merchants, except it be otherwise provided "by the contract."

"XVII. However, in cases of shipwreck the contract of "bottomry shall be *reduced to the value of the effects* that are "saved."

Ordonnance of Louis XIV, Sect. XXV, Art. 1.

The Commercial Code of France provides:

"Art. 327. In case of shipwreck, the payment of the sum "loaned on bottomry is limited to the value of the effects "saved and hypothecated under the contract, deduction being "made for the expenses of salvage."

Nouveau Code de Commerce.

In commenting upon this section Boulay-Paty says:

"Though the law mentions only the case of 'shipwreck' it "is necessary to recognize, as do Pothier and all writers, that "the case of 'shipwreck' is specified only as an example."

"Art. 327 is applicable in all cases when by *force majeure* "*ou cas fortuit* some portion of the goods affected by the "bottomry loan has been lost, and the remainder saved."

Boulay-Paty, Droit Commercial, Vol. 3, 179, 180, 183, 184.

Valin, while recognizing the right of the bottomry lender against the remnants or salvage of bottomried objects, argues that he should share in such salvage only in the proportion that the value of the saved objects bears to the original value of the bottomried objects.

Valin, L'Ordonnance de la Marine, Tome II Liv. III Tit. V, § 17, p. 195

Pothier combats this doctrine and argues convincingly that while the claim of an insurer may properly be reduced proportionately, that of a bottomry lender cannot be, upon the ground that when insurance of 5,000 francs is made on 20,000 francs of value, all is not insured, but that when 15,000 francs is loaned on 20,000 francs of value, all is pledged.

Oeuvres de Pothier, Edition 1806-1813, Vol. 16, Contrat d' Assurance, edited by Estrangin, p. 485.
Boulay-Paty, Droit Commercial, Vol. 3, 184.

Emerigon is decisive in saying that neither the borrower nor his insurer can put forward a claim to any portion of the articles saved until the lender has been fully satisfied.

Boulay Paty, Droit Commercial, Vol. 3, 184, 186 : Emerigon, Contrats a la Grosse, Tome 2, p. 548, § 2.

Pardessus says :

" The lender has a privilege for the entire amount due " to him against the objects hypothecated by the loan ; and " if these objects are of different nature, for example, if he " has loaned at the same time on the hull and the cargo, " his privilege is indivisible in such manner that if the ship " perish and the cargo is saved, the cargo is charged with the " whole of the loan, and this is so without any necessity of " showing that the expenses have, in fact, been incurred for the " benefit of such object."

Pardessus, Droit Commercial, Part IV, Tit. VI, Ch. IV, Sect. 2, Art 918, Vol. 3, pp. 557, 558.

The Commercial Code of Spain, founded on the Consulado del Mar, provides :

" In case of shipwreck the sum payable as the loan is re- " duced to the amount of the proceeds of the property saved, " less salvage charges."

Book III, Tit. 3, Sec. II., Art. 734.

Substantially the same provision is found in Italy :

" If the loss is partial, the payment of the sum loaned is " reduced to the value of the things hypothecated to the loan " and which are saved, without prejudice to the payment of " the expense of salvage and the payment of privileged claims " to which preference may be due."

Codice di Commercio, Libro 3, Titolo 5, § 599.

And in the Netherlands the provision is :

" If the objects upon which the bottomry loans have been " made are entirely lost, or are captured and declared lawful " prize, and the loss or capture have occurred through mis- " fortune or *force majeure* within the times and limits of the " risk, the sum loaned cannot be demanded. If a portion of " the pledged objects is saved, the lender preserves his rights " against such saved objects, but nothing further."

Commercial Code, Book II, Sec. 588.

This codification is a preservation of the doctrine of the early Dutch writers.

Bynkershoek, following Grotius, says in his chapter headed, *De Contractu qui dicitur Bodemery*, that when the ship and its furniture have been hypothecated "*quicquid ex navi & instru-*" *mentis superest creditoribus cedere.*" *Bynkershoek, Quaest. Pub. Liber III., Cap. XVI., p. 509.*

And another Dutch writer says:

" When the ship is lost, but some part of the tackle is pre-
" served, either by floating ashore or by salvage, the creditor on
" bottomry is preferred on their proceeds so far as they extend,
" since bottomry is on the security of the ship's keel and
" tackle; but when these are insufficient the borrower is not
" liable further."

Van der Linden on the Laws of Holland, 613.

For more than a hundred years, at least, the bottomry lender has had the benefit of salvage in Denmark.

Walpole vs. Ewer, reported in *Park on Marine Insurance, 2d Ed., p. 433.*

The Commercial Code of Portugal similarly provides:

" In case of wreck or of other great loss the payment of the
" sum taken on bottomry shall be reduced to the value of the
" things saved and which are affected by the contract, after de-
" ducting the salvage expenses. If this value exceeds the prin-
" cipal loaned the excess shall pay the premium which shall
" have been agreed upon or shall be applied on account of it
" in case it cannot be fully paid."

Codigo Commercial Parte II., Livro Unico do Commercio Maritimo, Tit. XIII., Art. XL., § 1660.

The laws of Peru, where the master of the *Andrew Johnson* gave this bond, are of the same purport.

" Sec. 857. In case of shipwreck the bottomry lender receives
" the proceeds realized from the saved objects in regard to
" which the loan was contracted after deduction of the ex-
" penses incurred for their salvage."

" Sec. 858. If in case of shipwreck there are insurers of the
" objects as well as a bottomry lender, the latter must be first
" satisfied, and then the insurers with the balance, *pro rata.*

Commercial Code of Peru, Sect. II., § 857, 858.

In England alone, of all maritime nations, has there been

any difference of opinion among writers, and the difficulties there may all be traced to a declaration of Lord MANSFIELD, in 1782, in the case of *Joyce vs. Williamson.*

The action was on a bottomry bond in the amount of £600 covering a voyage from Tagus to New York. The vessel was captured, and later was recaptured and taken into Halifax, where part of the cargo was sold for salvage and repairs. The value of the vessel on arrival in Halifax was £225, her repairs were £500, and, being repaired, she proceeded to New York. Verdict was given for the plaintiff on this bond, and upon a rule *nisi* for a new trial, Lord MANSFIELD said :

" It was admitted that on a bottomry bond there is no " average or salvage ; but it was contended that the case came " within the words of the clause making the bond void in case " of recapture by the enemy. But on consideration we are all " of opinion that the taking by the enemy there contemplated " does not mean a merely temporary taking, which is only an " obstruction. To come within the clause it must be such a " taking as constitutes the loss of the ship, and which would " amount, between insurer and insured, to a total loss. Here " there was no such total loss. The vessel earned her freight " and is safe. Either way it is a hardship ; but the law allows " no average or salvage on bottomry bonds and the rule must " be discharged."

Joyce vs. Williamson, 3 Douglas, 164.

This has undoubtedly been interpreted by many courts and writers to mean that a bondholder is not entitled to salvage when the voyage fails. Yet later English decisions seem based upon a contrary doctrine. Thus, in 1816 it was held that a bottomry lender could make no claim against his insurer for the loss of his bond, when the vessel had been driven by tempest into a port of refuge and had there been broken up and sold, it appearing that repairs would cost £3,200, and her value when repaired would be only £2,000. In this case Lord ELLENBOROUGH said :

" As nothing short of an actual total loss will discharge the " borrower of money upon bottomry, so nothing less will " render the insurer liable. * * * In the case of bottomry " nothing short of the total destruction of the ship will consti- " tute an utter loss."

Thompson vs. Royal Exch. Ass. Co., 1 Maule & S., 30.

In a more modern case Dr. LUSHINGTON in 1851 held :

" If a ship was once bottomried the bond attached to the " very last plank, and the holder might have that sold for his " benefit. I have no doubt that when the ship arrived at " Bahia, if she was unable to prosecute her voyage, the bond " instantly became due, the condition was gone, and the bond " was good."

The Catherine 15, Jurist Part I., 232.

See also, *The Elephanta 9 English L. and Eq. 553.*

In 1868 Sir ROBERT PHILLIMORE, evidently doubting the accuracy or applicability of Lord MANSFIELD'S language, questioned whether in the absence of a salvage clause in a bottomry bond thelender would not, by the general maritime law, have a right to the benefit of the proceeds of the wreck ; but did not consider it necessary to decide the question, saying :

" It is not necessary that I should express an opinion " whether, on the contingency of a wreck, the lender would or " would not be entitled to this kind of salvage by the common " law merchant, or whether, in order that he should have this " right, the insertion of these words was necessary."

The Great Pacific, L. R., 2 Adm. & Ecc., 381, 385.

Park, an early English writer on marine insurance, in considering Lord MANSFIELD'S dictum, refers to *Statute 19, George II., Ch. 32*, which allowed the benefit of salvage to lenders upon vessels or goods going to the West Indies :

" clearly showing that there was no such thing (as salvage) at " *common law :* otherwise there was no occasion."

and adds :

" In this respect our law differs from that of France and " also from that of Denmark, *vide* Walpole vs. Ewer."

Park on Marine Insurance, 2d Ed., 423.

Other English elementary writers have attributed Lord MANSFIELD'S ruling to the influence of the common law, or have disagreed with him outright.

Sergeant MARSHALL says :

" It must be admitted, however, that without the benefit of " salvage this contract must partake greatly of the nature of a " wager, even when the money is lent upon goods on board of

" equal value. If there be a total loss of the ship, the lender " loses all, though all the goods are saved."

Marshall on Marine Insurance, 5th Ed., 599.

Mr. Phillips, an American writer, says:

" It seems that in the earlier stages of English commercial " jurisprudence lenders on bottomry, or at *respondentia*, as- " sumed only the risk of total loss; but they now usually as- " sume the losses for which underwriters are liable in the com- " mon form of policies of insurance, and are entitled to sal- " vage."

Phillips on Insurance, Sec. 1484a.

See also, *Sections 1168, 1170, 1175.*

Mr. MacLachlan throws off Lord Mansfield's authority, and says:

" So long as the ship remains in specie and under the con- " trol of the owners, the validity of the bond survives. She " may remain in specie a ship, but, being captured as prize of " war, the loss is total and the bond defeated. If she ceases " to be a ship by reason of unavoidable sea perils, the bond- " holders' lien *attaches to the salvage*, if there be any."

MacLachlan on Merchant Shipping, 4th Ed., 129.

With this uncertainty in Great Britain, it has been not uncommon, in drawing a bond, to give to the lender specifically a remedy against all salvage. But such specific remedy did not appear in the bonds passed upon by Dr. LUSHINGTON in the *Catherine*, or by Lord ELLENBOROUGH in *Thompson vs. The Royal Exchange Insurance Company.*

The Admiralty law of the United States is drawn from the general maritime law, and not from the English common law.

The Scotland, 105 U. S., 24.

The courts and elementary writers sustain the principle that, even without a specified privilege in respect to salvage, the bottomry lender may look to salvage.

Kent refers to Lord MANSFIELD'S ruling in *Joyce vs. Williamson*, and says that it has been

" much and justly questioned in the elementary works. It is " contrary to the maritime law of France, and of other parts of " Europe."

Kent's Commentaries, 14th Ed. 3, 359.

And the writer states his own conclusions as follows:

"Nothing but an utter annihilation of the *subject hypothe-*
"*cated* will discharge the borrower on bottomry. The prop-
"erty saved, whatever it may be in amount, continues subject
"to the hypothecation. The lender can look only to what is
"saved; and if that be not equal to the value of the loan, the
"lender must bear the loss of the residue, and he cannot re-
"cover the deficiency of the borrower. By the general mari-
"time law the lender on bottomry is entitled to be paid out of
"the effects saved so far as those effects go, if the voyage be
"disastrous."

Kent's Commentaries, 14th Ed., Vol. 3, 359, 360.

In 1807 the Supreme Judicial courts of Massachusetts discussed this question in the case of *Appleton vs. Crowinshield.* While they were unable to sustain the particular form of action in which the plaintiff sought relief, they held in fact that the lender was entitled to any salvage arising from the adventure.

Appleton vs. Crowninshield, 3 Mass. 443, pp. 463, 467, 473, 474.

And later, when an action was brought before them in different form, the claim of the bondholder was sustained.

Appleton vs. Crowinshield, 8 Mass. 340, pp. 357, 362.

In this court it has been held:

"Where the bond only covers the ship, the lenders run
"no risk as to the cargo, as they must be paid if the ship
"arrives in safety, even though the whole cargo is lost; but
"where the bond covers the cargo as well as the vessel, the
"lender, unless the condition is otherwise, is entitled to be
"paid even if the ship is lost, if enough of the cargo arrives
"in safety to pay the bottomry loan, the rule being that the
"maritime lien of the lender attaches to the entire property
"covered by the bond, or to all that part of it which arrives at
"the port of destination in safety."

Insurance Company vs. Gossler, 96 U. S., 647, 655.

In that case the bond contained a salvage clause. For that reason, perhaps, the following paragraph may be deemed *obiter*, and not controlling upon the present case; but it is at least entitled to great respect.

" By the general maritime law the lender on bottomry is " entitled to be paid out of the effects saved, so far as those " effects go, if the voyage be disastrous."

Insurance Company vs. Gossler, 96 U. S., 645, 656.

B. We submit, therefore, that the bottomry lender was entitled to enforce payment at Hamburg against the cargo shipped in the *Mary J. Leslie*, as being salvage or remnants from the " objects " or " subjects ", or " effects " originally hypothecated, and that the payment of the bond by the libellants was therefore in no sense a voluntary payment.

The question of the rights of the bottomry lender against salvage was dismissed from consideration by the Circuit Court of Appeals with the remark that it was " not necessary to discuss the question," because " there has been no salvage either of cargo or ship in this case."

Opinion Record, p. 64.

But the cargo on the *Mary J. Leslie* was as clearly salvage from the effects or subjects hypothecated, as would have been cargo or wreckage from the hull of the *Andrew Johnson.*

Second.

ASIDE FROM THE RIGHTS OF THE BOTTOMRY LENDER AGAINST THE CARGO IN HAMBURG, AS SALVAGE, HE HAD SPECIFIC RIGHTS UNDER THE BOND, UNIMPAIRED BY THE LOSS OF THE ANDREW JOHNSON.

Under a proper construction of the bond, the rights of the bottomry lenders were not affected by the loss of the *Andrew Johnson.*

The provision was that the " obligation " should become void upon payment of the amount of the bond by the master of the *Andrew Johnson*, and provides :

" Or if during the said voyage an utter loss of the said ves- " sel by fire, enemies, pirates, the perils of the sea or naviga- " tion, or any other casualty shall unavoidably happen to be

" sufficiently proved by the said James H. Killeran, then and " in either of the said cases this obligation shall be void, other- " wise to be and remain in full force and virtue."

Bond, p. 10.

The sinking of the *Andrew Johnson* by the *Thirlmere* at sea, and the consequent non-arrival of the *Andrew Johnson* in Hamburg, rendered null and void only the personal obligation of the master, and did not void the bond as against the cargo which arrived by the *Mary J. Leslie.*

The master, in giving the bond, said :

" I bind myself, my heirs, executors or administrators " *(Bond, p. 8).*

The charge thus made upon the master and his personal estate, was given merely as a pledge of good faith, in recognition of the liability falling upon him under the maritime law, and codified in the German Commercial Code as follows :

" ART. 694. When the master has arbitrarily changed the " bottomry voyage, or when he has arbitrarily deviated from " the proper course, or when, after its termination he has again " exposed the bottomry objects to sea risks without having " been compelled to do so in the interest of the creditor, " the master is personally answerable to the creditor for the " bottomry debt, so far as the latter does not receive his pay- " ment out of the bottomried objects, unless he proves that " the non-payment has not been caused through the change of " voyage, or through the deviation, or through the new sea " risk.

ART. 695. The Master shall not deliver the bottomried " cargo, either entirely or partially before the creditor has been " paid or properly secured ; otherwise the master is personally " answerable to the creditor for the bottomry debt, so far as he " could, at the time of this delivery, have been paid by the goods " so given up. Until the contrary has been proved it shall " be considered that the creditor could have been paid in " full."

German Commercial Code, Arts. 694, 695 ; Record, p. 37.

The Code of Peru provides similarly :

" The claim of the lender is not extinguished, even if the " goods pledged for payment of the loan perish in so far as the " damage to them results from one of the following causes :

" 1. From the inherent defect of the goods themselves.

" 2. From *dolus* or *culpa* of the borrower.
" 3. From barratry of the master or crew.
" 4. If the goods are shipped by another vessel than the " one named in the contract, unless it becomes necessary to " tranship the cargo from the ship so named to another, in " consequence of *vis major*."

Commercial Code of Peru, Sect II., §850.

The same principle is recognized in the Admiralty Rules of this Court.

" In all suits on bottomry bonds, properly so called, the " suit shall be *in rem* only against the property hypothecated, " or the proceeds of the property, in whosoever hands the same " may be found, unless the master has, without authority, given " the bottomry bond, or by his fraud or misconduct has avoided " the same, or has substracted the property, or unless the " owner has, by his own misconduct or wrong, lost or sub- " stracted the property, in which latter cases the suit may be " *in personam* against the wrongdoer."

18th Admiralty Rule, U. S. Supreme Court.

And similar provisions are universal in the codes and laws of European countries.

There are different points of view, from which it appears that the sinking of the *Andrew Johnson* did not void the bond as against the cargo which arrived by the *Mary J. Leslie.*

These views are sustained, not only by the grammatical construction of the bond, but by the significance to be given to the words " utter loss."

A. Even if the *Andrew Johnson* had proved an " utter loss," the bond would not be forfeited thereby; for the words " said vessel " in the defeasance clause relate, clumsily perhaps, but clearly, to either the *Andrew Johnson* or the *Mary J. Leslie.*

The instrument should be construed liberally.

Abbott on Shipping, 12th Ed., p. 112.

" For the reason that a bottomry bond is supposed to have " saved the ship, it is construed very liberally by all Courts, " and, if possible, the intention of the parties is carried into " effect."

Parsons on Shipping and Admiralty, Vol. 1, 162.

a. The same words " said vessel " are used earlier in the defeasance or condition clause in this connection:

" Now, the condition of this obligation is such, that if the " said vessel shall forthwith set sail from Callao aforesaid, and " without unnecessary delay or deviation proceed on her in- " tended voyage to Hamburg, and if the above bounden James " H. Killeran shall and do within the space of five days next " after the arrival of the vessel at her final port of destination, " and *before commencing to discharge the cargo,* * * * well " and truly pay or cause to be paid, &c., &c., &c.," *(Bond, pp. 9, 10).*

Here the words " the said vessel " clearly relate to both the *Andrew Johnson* and the *Mary J. Leslie,* for it is apparent that it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamburg earlier than the *Andrew Johnson,* she would lie in Hamburg " before com- " mencing to discharge the cargo " pending the possible arrival of the *Andrew Johnson.*

If " the said vessel," in the earlier part of the defeasance clause, refers to each of the two vessels, then it certainly must carry the same meaning when next used in a later position in the same clause.

b. Only by such construction can due effect be given to the intention of the parties.

It was clearly the purpose of the parties to the bond that whatever got through to Hamburg, whether the *Andrew Johnson,* or whether the *Andrew Johnson's* cargo, or whether the *Mary J. Leslie's* cargo, should be held to pay the bond.

The *Andrew Johnson* herself was worth $60,000 *(O'Brien, p. 23, Killeran, p. 40).*

The major part of her cargo remained on board of her and was worth nearly $50,000. Her freight was about $20,000 *(Exh. 3, p. 19).*

It is apparent, therefore, that the *Andrew Johnson* and the cargo on board of her were amply sufficient to protect the bond, being nearly ten times the amount of the bond, if the parties had intended to limit their security to the one bottom of the *Andrew Johnson.*

Though the security was enormous in amount, the parties apparently were not content to rely upon one bottom, and therefore included the cargo of the *Mary J. Leslie,* which was worth about $40,000 *(Wirtz, p. 31).*

If the *Andrew Johnson* and her cargo and freight had ever reached Hamburg, the security afforded to them was so ample that the bondholder would have no occasion to look to the cargo on the *Mary J. Leslie.*

We must assume, therefore, that the cargo on board the *Mary J. Leslie* was subjected to the bond in order that the bondholder would have security even though the *Andrew Johnson* and her remaining cargo did not reach destination.

c. The learned District Judge accordingly construed the bond as enforceable against the cargo arriving by the *Mary J. Leslie.* He did this at a time when the question came before him on exceptions to the libel, at which time it was supposed by him that the *Andrew Johnson* had become an "utter loss" *(Opinion, pp. 41-45.)*

It is significant that, since the Court so interpreted the bond, both the master and the owner of the *Andrew Johnson* have been called as witnesses, and neither of them has suggested that there was any intention to make the bond depend upon the arrival of the *Andrew Johnson* at Hamburg.

This question was passed upon, too, by the Hamburg counsel of the bondholders and of the cargo-owners, to whom the question of the liability of the *Mary J. Leslie's* cargo was submitted. They said:

"Some doubt might be raised as to whether, according to "the wording of the bottomry bond, the money was not lent "or appear to be lent contingent upon the safety of the "*Andrew Johnson*, and becoming due only after her arrival at "her port of destination, but becoming null and void in the "event of her non-arrival. We are of opinion, however, that "this interpretation is not consistent with the real intention "of the contracting parties, and that the wording referred to "has originated in the not sufficiently careful use and employ-"ment of a form of bond which happened to be at hand. This "seems the less doubtful to us for this reason, that if the "bottomry bond were interpreted in this manner, the cargo of "the *Mary J. Leslie* would be entirely liberated, after the loss "of the *Andrew Johnson* occurred, and would not even bear a "portion of the bottomry debt, which nevertheless has arisen "out of a case of general average. Manifestly this cannot "have been the intention of the parties interested" *(Record, p. 33.)*

d. The construction given to the bond by the Judges of the Circuit Court of Appeals, is literal in the extreme, and to an extent that deprives the instrument of its palpable and necessary meaning. They construe the words "said vessel" to refer solely to the *Andrew Johnson.*

To their minds the master referred only to the *Andrew Johnson* when he stated that he had been unable to obtain funds:

"in any other way than by bottomry and hypothecation of the "said vessel, her boats, apparel, cargo, and freight."

Although in the very next paragraph he pledges specifically and in terms:

"the cargo transhipped to the *Mary J. Leslie*"

and thereby secures the funds which he has just said that he was unable to get, except by a bottomry of the "said vessel" and her cargo. *(Bond, p. 9).*

Stress is laid upon the recital of the bond that the lenders

"are contented to stand to and bear the risk, hazard and ad-"venture thereof upon the hull, body or keel of the said "*Andrew Johnson*, her boats, tackle, apparel and furniture, "together with the cargo laden on board as aforesaid, and the "freight to be earned and become payable as aforesaid." *(Bond, p. 9)*

as indicating that the agreement was merely a wager between the borrower and lenders as to the arrival of the *Andrew Johnson* at destination with the remnant of cargo which she was herself carrying, and that the lenders having thus "staked" their money must lose it. *(Opinion, p. 64).*

The clause appears in the fifth paragraph of the bottomry bond, and in that paragraph falls between a recital that Grace Bros. & Company, the lenders, have agreed to lend the required funds to the master

"upon his executing this present bond or obligation and "hypothecation of the said vessel, her boats and apparel and "her cargo, including that portion of the cargo transhipped to "the *Mary J. Leslie*, and the freight to be earned and become "payable in respect of the said voyage"

and the formal engagement by which the master did

" mortgage, hypothecate and charge the said vessel, her boats, " tackle, apparel and furniture, and her cargo, including that " portion of the cargo transhipped to the *Mary J. Leslie*, and " the freight to be earned and become payable in respect of " the said voyage.

Here there came (1st) a recital of the agreement to lend on the cargo

" including that portion of the cargo transhipped to the *Mary* " *J. Lestie*",

and (2nd) a recital of the hazards and adventures which the lenders are content to take upon the vessel

" together with the cargo laden on board, *as aforesaid*";

and (3rd) the formal pledge of the vessel and cargo

" including that portion of the cargo transhipped to the *Mary* " *J. Leslie*".

It cannot indeed, be said that the bond is perfect in expression, or that there had been a "careful choice of words" to express the meaning of the parties; but certainly it is apparent that the lenders intended that the agreement to lend, the hazard, and the pledge, should relate to the same property.

But a different construction was given by the Circuit Court of Appeals.

B. In fact, moreover, the *Andrew Johnson* did not become an "utter loss."

She went to the bottom of the sea as the result of the collision with the *Thirlmere*; but that fact did not render the owner's interest in her valueless, for the very circumstances which sent her to the bottom gave to him a claim for the value of his vessel and freight against the *Thirlmere*. For that value and to the limit of that value, if necessary, he must account to persons having claims against the vessel or against himself based upon the events of the voyage.

We are well aware, of course, that the shipowner is not obliged to account for his insurance moneys; but the language of the Supreme Court, in relieving the owner from accounting

for insurance, clearly indicates that he is bound to account for moneys received by him, not under an independent contract of insurance, but through rights based purely upon ownership of the vessel.

City of Norwich, 118 U. S., 468, 493, 503, 504.

The purpose of granting limitation of liability at all is to enable merchants to invest money in ships without subjecting them to "an indefinite hazard of losing their whole property "by the negligence or misconduct of the master or crew; but "only subjecting them to the loss of their investment." This Court has accordingly held that if a merchant contracts with an insurance company for indemnity against even the loss of his investment, he may be permitted to do so without any obligation to account for the proceeds of such contract *(p. 504)*.

When a right of recovery exists, however, based not upon an independent contract of insurance, but upon the very loss itself by regular operation of law, because of ownership in the vessel, and not because of an independent contract, the case is different. Then a recovery is, in effect, the vessel or the freight which it represents; and such vessel and freight is not an "utter loss." The shipowner hazards nothing beyond "the loss of his investment."

The right of recovery which came to the owner of the *Andrew Johnson* by reason of the sinking of his vessel, was valuable. He presented it in the courts of Great Britain and received £5179-13-6 on account of his freight vessel, and £858-6-11 on account of his freight *(O'Brien, p. 24)*. He did not recover full payment only because the *Thirlmere* was insufficient in value to pay all losses, and her owners under the operation of the British statutes for limitation of liability, paid only a dividend.

C. The payment by the libellants of the bond was substantially a forced payment.

The *Mary J. Leslie* arrived in Hamburg, February 5th. The nitrate of soda had been shipped in the name of the master of the *Andrew Johnson* and subject to the terms and conditions of the *Andrew Johnson's* original charter party, and as being "included in and jointly responsible with the nitrate of

" soda specified in the bottomry and respondentia bond given " to Messrs. Grace Bros. & Company as security for the pay- " ment of the American ship *Andrew Johnson's* disbursements " in Callao." *(Bill of Lading, p. 11).*

By the terms of the bond it fell due February 10th, five days after arrival of the cargo in Hamburg, and on that date formal demand was made by a notary *(Stockfleth, p. 30).* In the absence of specific provision in the bond regulating the time of payment, the statutory due date was eight days after arrival *(German Commercial Code, Art. 699, Record, p. 48).*

No discharge of the cargo was made meantime, nor was any permitted until after arrangements had been effected between Antony Gibbs & Sons and Baring Brothers & Company to secure the payment of the bond.

On the 11th of February, in order to secure the release of the cargo, Antony Gibbs & Sons gave a formal written engagement to Baring Brother & Company to pay " whatever pro- " portion of the said bottomry and respondentia bond may " be found to be legally due from the said cargo " *(Sillem p. 26, Exh. A, pp. 26, 27).* This engagement was accepted by Baring Brothers & Company, and the discharge of cargo began about the 16th of February *(Wirtz, p. 30).*

Immediate steps were taken to ascertain the law, and it was under the advice of eminent lawyers representing each party that the amount of the bond was paid *(Wirtz, pp. 30, 31 : Wolffson, pp. 32, 33 ; Stammann, pp. 33, 34).*

Third.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS WITHOUT PRECEDENT TO SUSTAIN IT.

The learned Judges say :

" No doubt damages recovered for the tortious act of a " colliding vessel are often treated in admiralty as a substitute " for the destroyed vessel. But the hazard taken by the " bottomry bondholder is the physical survival of the ship, or " at most of any salvage from her. When she goes to the

" bottom with all she holds, there is an utter loss within the " meaning of the contract of bottomry, and the bond goes down " with the vessel " *(Opinion, p. 65).*

We submit that, it being the practice of the Courts of Admiralty to treat damages recovered for the tortious act of a colliding vessel as a substitute for the destroyed vessel, such damages or right to damages constitute salvage.

No authority is cited to show that such a loss is an " utter loss " within the meaning of a contract of bottomry, and such a doctrine is certainly inconsistent with the universally-accepted doctrine that the damages may be taken to represent the destroyed vessel.

Even if the damages so recoverable are not a *res* that can be proceeded against by the bondholder, still the fact of the existence of the right to such damages relieves the situation from being one of " utter loss," and prevents the bond becoming void.

If there is not an " utter loss," then the bond is not rendered void, and is certainly operative upon all surviving pledged property, whatever might otherwise be the liability of such property.

German Commercial Code, Arts. 691, 692. Record p. 37.

It should be borne in mind that this action is not one for the enforcement of the bond, but that it is an action brought by the owner of cargo, who has upon demand and under the deliberate advice of eminent counsel paid the entire bond in the belief that he was legally bound to make such payment, to enforce contribution from the shipowner for his proportionate share of the expenses for which the bond was given.

Fourth.

THE BOND, BEING VALID AS AGAINST THE CARGO, AND ENFORCEABLE AGAINST THAT PORTION OF THE CARGO ARRIVING IN HAMBURG ON THE MARY J. LESLIE, THE LIBELLANTS, UPON PAYMENT OF THE BOND, BECAME ENTITLED TO RECOVER FROM THE SHIPOWNER HIS PROPORTION OF THE EXPENSES INCURRED AT CALLAO.

The expenses at Callao grew out of the distress into which the *Andrew Johnson* fell at sea. Some of them were properly chargeable upon the ship alone, some upon the ship-owner alone, some upon the cargo alone, and some upon all interests.

They might have been paid at the time by the respective parties or by either of the parties; but, in accordance with custom, it is usual to make the assessment or distribution or contribution at the end of the voyage.

If the shipowner had paid the expenses at Callao, or if he had taken up the bond at Hamburg, he would have reimbursed himself through a statement and adjustment of general average for such portion of the expenses as was properly chargeable upon the cargo, taking from the consignees of cargo, upon discharge of the cargo, a general average bond.

The shipowner neither paid the expenses at Callao, nor did he take up the bond; but left payment upon the bond to be enforced from the owners of the cargo.

The owners of the cargo having paid all charges is legally titled to contribution upon a proper statement and adjustment.

Benson vs. Duncan, 1 Exch., 537; 3 Exch., 644.
Appleton vs. Crowninshield, 8 Mass., 340, 360.

The principle was fully recognized by Chief-Justice TANEY, though in the case then under consideration by him he relieved the shipowner from actual payment, upon the ground of limitation of the shipowner's liability, the vessel in that case having been already exhausted by the bond.

Naylor vs. Baltzell, Taney's Decisions, 55.

The owner of the *Andrew Johnson*, however, did not lose his vessel. Aside from his reimbursement through insurance, with which we have nothing to do, he received from the pro-

ceeds of the *Thirlmere*, on account of his vessel, £5,178–13–6, and on account of her freight £858–6–11 *(O'Brien, p. 124)*. These figures represent "the amount or value of the interest "of such owner in such vessel, and her freight then pending," which is established by statute to be the limitation of the shipowner's liability.

U. S. Revised Statutes, Sec. 4283.

Every equity is with the libellants.

By the exigencies of the voyage they have been forced to pay the expenses which should have been paid by the shipowner—expenses which, in fact, repaired and preserved the shipowner's property, and gave to it at least some part of the value for which compensation was made to him by the *Thirlmere*.

Fifth.

THE SHIPOWNER, BEING UNDER PERSONAL LIABILITY TO THE BOTTOMRY LENDERS TO ACCOUNT TO THEM FROM THE MONEYS COLLECTED FROM THE THIRLMERE, HAS NOT BEEN PREJUDICED BY THE PAYMENT OF THE BOND BY THE LIBELLANTS.

If the bottomry lender had, under the authority of *Appleton vs. Crowninshield*, collected the entire bond from the shipowner, it would have remained for the shipowner to cause an adjustment to be stated and to seek contributions from the owners of the cargo. As matters now stand, the cargo owners have paid the bottomry lender and have caused the adjustment to be made, and they seek contribution from the shipowner.

Such an adjustment states accurately the ultimate liability of the shipowner and the cargo owners. It is legally immaterial which interest makes the advance primarily.

The case of *Appleton vs. Crowninshield* is of peculiar pertinence to the point now being considered. It engaged the attention of the Massachusetts courts for nearly twenty years.

As originally instituted it was an action of debt bronght on a bottomry bond.

Appleton vs. Crowninshield, 3 Mass., 443.

The loan had been effected in Salem, November 25, 1793, on the schooner *Charming Sally*, in the amount of £300, covering a voyage to the West Indies and back to Salem.

The outward voyage was safely made, but on the return voyage the schooner was captured by the British and condemned. Afterwards the Lords Commissioners of Appeals in Great Britain reversed and annulled the decree of condemnation. The schooner was not, however, returned in specie to her owner, but an award for her full value was paid by Great Britain to her owner, Crowninshield.

The case came before the Supreme Judicial Court in November 1807. The defendant contended that the bond was void, in that the schooner never performed her voyage and had never returned to Salem.

The plaintiff, by way of replication, set up the capture and condemnation of the schooner, and the subsequent award to her owner.

Upon these pleadings the Court held that the action of debt on the bond would not lie, holding however that the award constituted a salvage for which the ship owner would be accountable to the bottomry lender in a suitable form of action *(p. 467)*.

Justice PARKER said :

" In equity the plaintiff's case is undoubtedly very strong ; " and I can see no principle of commercial honor upon which " the money can be withheld by the defendant ; but we must " decide upon the established legal principles, and are not at " liberty to wander into the field of equity to do justice to the " parties. The question with us is, whether any event within " the condition of the bond has happened whereby the obligor " is discharged from his contract." *(p. 461)*.

Justice SEWALL said :

" The compensation received by the borrower, the defend- " ant, may comprise *a salvage* for which he is accountable to " the lender, the plaintiff ; but a demand of that nature, if it is " recoverable, must be maintained in another form of action." *(p. 468)*.

Justice SEDGWICK said :

" I cannot omit to observe that it is impossible for the " mind to doubt with which of these parties the justice of the

" case rests. The defendant has received, and now holds, the " plaintiff's money. With a good conscience he certainly can- " not retain it ; and I confess that I should exceedingly regret " if he was authorized to do it by the positive rules of law." *(pp. 469, 470).*

But the action could not be maintained as an action of debt on the bond.

Subsequently the bottomry lender brought a new action, still at common law, against Crowninshield, on *assumpsit* for money had and received, which came before the same Court and the same Judges in 1811, and was then sustained.

Appleton vs. Crowninshield, 8th Mass. 340.

The owner of the *Andrew Johnson* recovered from the owners of the *Thirlmere* more than $30,000, because of the loss of his vessel and freight through collision.

This recovery constituted a salvage which might be proceeded against *in rem*, or in respect to which an action would lie in favor of the bottomry lender against the ship owner at common law for money had and received.

By paying the bond the cargo owners have not prejudiced the ship owner or increased his liabilities. If after payment they had brought an action for the whole amount of the bond, leaving him to offset the share due from the cargo by way of contribution in general average, such action would not be to his prejudice.

In place of such action the cargo owners have recognized their liability to contribute in general average, and have brought action against the ship owner only for his contributory share.

The libellants might even be treated as assignees of the bond, and entitled to the rights of the bottomry lender, at least to the extent of the shipowner's contributory share without any hardship to the ship-owner. He would be repaying only what was expended for his account at Callao—an expenditure which preserved his property and entered into the value which he recovered against the *Thirlmere*.

Sixth.

THE BOND WAS VALID AND WAS PROPERLY SECURED BY THE HYPOTHECATION OF THE CARGO.

In order to validate a bottomry bond made at a port of distress, it must appear that the expenses for which the bond was issued were necessarily or prudently incurred, and that they were for the benefit of such interests as were hypothecated in the bond.

The master can neither sell nor hypothecate his cargo except in case of necessity, and his authority for that purpose is no more than may be reasonably implied from the circumstances in which he was placed. He acts for the owner of the cargo, because there is a necessity for some one to do so, and, like every agent, whose authority arises by implication of law, he can only do what the owner, if present, ought to do.

The Julia Blake, 107 U. S., 418, 426.
Duncan v. Benson, 1 Exch. 537; 3d Exch. 644.
The Lizzie, Law Rep. 2 Ad. & Ec. 254.
The Karnak, Law Rep. 2 Ad. & Ec. 289.
The Onward, Law Rep. 4 Ad. & Ec. 38, 57.

As to the necessity and prudence of forwarding certain of the cargo of the *Andrew Johnson* and of raising the funds therefor by pledging the vessel, freight and cargo, neither the allegations of the libel nor the averments or denials of the answer are to control; but the facts admitted in the pleadings, and the proofs taken in the cause, must govern.

A. The libel alleges that it would have been better to make no repairs to the vessel, and to forward all the cargo in other bottoms, and that the arrangement that was adopted was for the advantage of the ship-owner *(Libel, Art. 4, p. 5)*. These allegations are denied by the ship-owner *(Ans. Art. 8, p. 12)*.

The proofs show that, in the opinion of surveyors, it was for the "interest of both the owners of the ship and "cargo" to forward a portion of the cargo in another bottom and to make sufficient repairs to the *Andrew Johnson* to enable her to proceed upon her voyage *(Ex. No. 5, pp. 20, 21)*.

The testimony of the master shows that he was governed by the recommendations of the surveyors *(Killeran, p. 17)*, and that he met the expenses thereby incurred by the bottomry and *respondentia* bond *(Killeran, p. 17)*.

It must, upon this condition of the pleadings and proofs, be held that the procedure adopted was prudent and wise.

This view is sustained by the fact that the repairs to the vessel were not of a costly character and that "most of the ex- "pense was incurred in transhipping the cargo" *(Killeran, p. 41)*.

The entire amount of the bond, including maritime premium was £2599-8-9, or about $12,500 *(Bond, p. 10)*. Of this entire sum only about $6,091.73 was chargeable against the ship, and that sum included the ship's share of general expenses, as well as those which rested upon her particularly *(Decree, pp. 55, 56)*.

These figures indicate that more than half the expenses were incurred primarily upon account of the cargo, and would require to be ultimately paid by the cargo in any general average adjustment. Considering the bulky character and comparatively low value of the cargo, the expense of transhipping the remaining portion of the cargo from the *Andrew Johnson* to other bottoms would have very greatly increased the charges upon the cargo.

It was not only the right, but the duty of the master to carry out as far as practicable the engagement which he had made of carrying the cargo forward in his own vessel.

The master is bound "to look out for the means of accom- "plishing his contract if possible; that is, the safe conveyance "of the property intrusted to his care, in that same vehicle "which he has contracted to furnish."

The Gratitudine, 3 C. Rob., 240, 261.

If the cargo-owner had insisted, at Callao, upon the surrender of all the cargo to him, that it might be forwarded in other vessels, he would have been bound, of course, to pay to the master of the *Andrew Johnson* the freight which the *Andrew Johnson* was entitled to earn. Such freight would have amounted to over $20,000 *(Charter, Ex. 3, p. 19)*.

The alternative of paying this large sum, together with the further expense of transhipping the cargo, makes conspicuous the wisdom of leaving as much of the cargo in the

Andrew Johnson as she could carry, even though the entire cargo thereby became subject to hypothecation under the bond.

B. The benefit to the cargo being established, it was proper to bind it for any necessary amount.

The libel alleges that large expenses were incurred

" in making the necessary repairs to the vessel and in supply-
" ing her to continue her voyage, and in transhipping the
" said portion of the cargo to the *Mary J. Leslie*, and in other
" matters pertaining to the seeking of the harbor of refuge, re-
" pairing his said vessel and preparing to carry and forward
" his cargo " *(Libel, Art. 5, p. 5).*

and that such expenses amounted in all to £2212-5-9.

The allegation is again revived that these charges were incurred for the benefit of the vessel and that the libellants, " not " being fully advised of the circumstances, and believing that " the said bond was properly and necessarily issued, assented " *(Libel, Art. 5, p. 6).*

The answer admits that expenses were incurred " in mak-
" ing necessary repairs to the ship and in supplying her and in
" transhipping the said portion of her cargo " and that the sum thereof, to wit, £2212-5-9, was borrowed by the master upon bottomry and *respondentia*, and was " applied by the
" master to paying and defraying the costs and expenses in-
" curred at the said port of refuge " *(Ans. Art. 9, p. 12).*

The proofs established in detail the expenses incurred, vouchers for all having been proved by the master *(Killeran, p. 18).* These expenses were, as the master states, in a deposition read by the respondent, largely incurred in transhipping expenses *(Killeran, p. 31).*

The detailed expenses are set forth in the adjustment made by Commissioner Walker under the interlocutory decree, that adjustment being transmitted to the Court in its original shape *(Rec. fol. 267).*

C. It was urged by the respondent in the Circuit Court of Appeals that the bond was void as to cargo, upon the asserted ground that communication respecting the bond was not had with the cargo-owners prior to pledging the cargo.

a. It is not, however, essential in all cases to communicate with the cargo-owner.

The bond in the case of the *Lizzie*, was sustained though there was no communication with the owner of the cargo.

The Lizzie, 2 Ad. & Ec. 254.

The bond, in the case of the *Karnak*, was sustained though, in that case, there was no communication with the owners of the cargo.

The Karnak, Law Rep. 2 Ad. & Ec. 289 ; 2 Privy Council, 515.

These are some of the more recent English cases of those cited by the respondent, and they show that while " it is, gen- " erally speaking, the duty of the master to communicate or to " attempt to communicate with the owner of the cargo," it is not essential that he do so in all cases, even though opportunity for communication exists.

Karnak, Law Rep., 2 Ad. & Ec., 289, p. 309.

Whether the master *must* communicate with the owner depends upon the circumstances. The importance of his communication with the cargo owner is greater in cases where there is a doubt or fair question as to the prudence of binding the cargo. In the cases above cited the Court held, as a fact, that the giving of the bond was so clearly reasonable that it must be deemed that the owners would have consented if communication with them had been had.

In the case of the *Karnak* it was held that, inasmuch as the vessel and freight were of value almost sufficient to meet the bond, the probability of the cargo being called upon to pay any considerable portion of the bond was quite remote, and that no special occasion existed for communication. This conclusion was reached, although the cargo owner urged vehemently that he might have preferred to pay freight and take possession of his cargo, the amount of his freight being only one-half of the amount of the bond for which his cargo was subsequently hypothecated.

The same conclusion was reached in the case of the *Lizzie*, the Court holding that there was neither authority nor improvidence on the part of the master.

In the case of the *Julia Blake,* Chief Justice WAITE after reviewing all English and American cases, relieved the cargo from the bond. In doing so he did not rely merely upon the fact that there was no communication with the owner, but he was influenced to his decision by the circumstances of the case.

There was only £110 freight due to the *Julia Blake* from the cargo and, by paying that amount the owner could have demanded and secured possession of his goods. The cargo had to be entirely discharged at St. Thomas, and the vessel put in dock for repairs and remetalling. She required new masts and sails and extensive repairs to her hull. The repairs amounted to $11,600, though the vessel was worth in New York, after all these repairs, only $4,500.

The Court said :

"It is not only found as a fact that it was for the "interest of the shipper that his property should be "forwarded by some other vessel rather than it should "be hypothecated to pay for the repairs, but every- "thing else in the findings points unmistakably to the "conclusion that such repairs could not have been "effected without an expense to him of very much "more than it would cost to reclaim his property, pay "all lawful charges upon it, and send it forward by some other "conveyance. *Under such circumstances,* we have no hesita- "tion in saying that the master had no authority to pledge the "cargo as he did without the consent of the shipper or con- "signees."

The Julia Blake, 107 U. S., 418, 432.

Applying these rules to the case at bar, it is apparent that there was little occasion to communicate with the owner of the cargo.

The bond was only $12,500 ; the vessel herself was worth $60,000 ; her entire freight was fully $20,000 ; her cargo was worth nearly $100,000.

b. A fatal defect in the respondent's case upon this point is that there is no issue raised by the pleadings as to the matter of communication with the owner of cargo.

Such an omission is purely matter of defense. This is apparent, because the omission, of itself, does not always invalidate the bond, and if it is sought to invalidate the bond

because of the omission to communicate with the cargo-owner, it must be pleaded and established that in the particular case, the omission to make such communication was fatal.

It was so pleaded in the *Julia Blake 16 Blatchf. 472, 492.*

Special pleading was also made in the *Onwrrd (4 Ad. & Ecc. 41)*, the *Lizzie*, the *Karnak*, and in every other case in which we have been able to secure any light from the reports as to the contents of the pleadings.

In this case there is no plea or suggestion in the answer that the bond was invalid for that or any other reason.

It is true that the " respondent denies the matters alleged " in Article Fifth of said libel and complaint except &c, &c " *(Ans. Art 9, p. 12)*, and that one of the allegations of said Article Fifth, thus denied, is

" the libellant, not being fully advised of the circumstances, " and believing that the said bond was properly and neces- " sarily issued, assented " *(Libel, Art. 5, p. 6)*

We submit, however, that such an answer cannot be construed as an averment that there was no communication with the owner of the cargo. It cannot even be construed as a denial that the libellants assented to the bond. At the most, it is a denial that the libellants were misled into assenting to the bond.

The allegation of the libel with the very indefinite answer thereto, must be deemed as establishing that there was, in fact, communication with the owner of the cargo.

Especially is this view correct in connection with the specific admissions that the master borrowed the £2212-5-9 required by him " upon credit of the instrument of bottomry and *respondentia* " *(Ans., Art. 9, p. 12)*.

c. It has never been disputed that communication with the owner of the cargo was in fact made. There has been no occasion therefore to take formal proofs to establish the fact, and it cannot now be argued that, because such proofs have not been taken, the fact did not exist.

d. As to the point now urged by the appellant that the bond is invalid, because the cargo, or that portion of it for-

warded by the *Mary J. Leslie*, was not benefited by the repairs to the *Andrew Johnson*. The question of the relative shares of vessel and cargo for the expenses incurred has been determined by the report of the Commissioner, fixing the principal amount chargeable against the shipowner at $6,091.73, to which report no exception was filed by the respondent *(Decree, fol. 273)*.

Seventh.

THE ACTION IS ONE OF ADMIRALTY JURISDICTION.

It is founded upon the original contract of carriage by which the owner of the *Andrew Johnson* contracted to deliver the cargo at Hamburg, upon payment of freight.

Instead of so doing, he delivered it there subject to the lien of bottomry and *respondentia* and, instead of caring for that lien himself in the first instance, the owner of the cargo has been compelled to pay it to secure possession of his goods.

It is as though the master had jettisoned some of the cargo. The cargo owner would properly seek contribution from the ship owner for the ship owner's contributory share.

Dupont v. Vance, 19 How., 162.
Ins. Co. v. Dunham, 11 Wall. 1.
Heye v. North German Lloyd 33 F. R. 60.
Olivari v. Ins. Co., 37 F. R. 894.
Sweeny v. Thompson, 39 F. R. 121.
Wheaton v. Ins. Co. 39 F. R. 879.
Bowring v. Thebaud, 42 F. R. 520.

The action is brought to recover, not the amount of the bond, but the ship owner's share of the expenses for which the bond was originally given, and which the cargo owner has been compelled, in breach of the contract of carriage, to pay for account of the ship owner.

The respondent was the owner of the *Andrew Johnson* at the time the contract of carriage was made and at the time the expenses were incurred, and is, therefore, the proper party

defendant. There can be no merit in the suggestion that, because the ship owner was partially insured and abandoned the insured interest to his underwriters after the loss of the vessel, the underwriters are, as owners of the vessel, directly responsible to the libellants for any portion of the libellants' claim.

The ship owner who has incurred the responsibility of carrying goods, cannot shift the responsibility by transferring his vessel to another party, especially after a loss has arisen.

Eighth.

THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND A MANDATE SHOULD ISSUE TO THE HONORABLE JUDGES OF THAT COURT TO DIRECT THE AFFIRMANCE OF THE DECREE OF THE DISTRICT COURT WITH INTEREST AND COSTS.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for libellants.

WILHELMUS MYNDERSE,
Advocate.

APR 27 1895
JAMES H. McKENNEY,
Clerk.

No. 991

Brief of Black for Resp't

U. S. Supreme Court.

Filed Apr. 27, 1895.

Brice Allan Miller et al.,
Libellants and Appellees,

vs.

Edward E. O'Brien,
Respondent and Appellant.

Brief for Respondent

In Opposition to Petition for Certiorari.

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U. S. Supreme Court.

BRICE ALLAN MILLER *et al.*
Libellants,

vs.

EDWARD E. O'BRIEN,
Respondent.

Respondent's Answer to motion for Certiorari.

The libellants petition for *Certiorari* in its fourteenth article asserts six reasons for granting it. It will be noticed that there has been a straining after numbers and to attain multiplicity the same point is repeated more than once.

The interpretation of the bond by the circuit Court of Appeals being different from that of the District Judge (to whom as a *make-weight* is added the Hamburgh lawyers), is no reason for a *Certiorari*, unless the same circumstance would *always* lead to this result, and manifestly this is not so.

The "disagreement" of reason No. 1, is not different from the "conflict" of reason No. 2; and the "conflict" repeated in reason No. 3 is precisely the same as Nos. 1 and 2, *i. e.* that by its wording, the bond being expressly made void by the "utter loss" of the Andrew Johnson, such result in the opinion of the C. C. of Ap. followed that event.

The ingenuity of counsel has been strained to make the surviving *right of action* against the Thirlmere the same as the *actual existence* of the Andrew Johnson.

Whatever rights might flow from the collision and loss of the Andrew Johnson clearly *the collection of the bond from the obligor* or its enforcement *in rem* against the libellants' cargo, was not one of them. The libellants paid the *bond* as a valid lien on their cargo, without contest, and by reason of that *payment* seek to recover from respondent.

The 4th "reason" is not presented by the pleadings or proofs. The action was to recover *because* the bond was paid by the libellants; if the bond was not due, or was void, or avoided, the payment gave rise to no claim against respondent.

In the **ninth** article of the petition the proceedings in the English court are briefly referred to, and it is stated that "libellants received such proportion of the value of the Thirl-" mere as was due them *in respect to the cargo sunk with the* " *Andrew Johnson.*"

On the trial of this appeal respondent put in evidence the following stipulation, and the fact that libellants appeared and contested with respondent in the Thirlmere limitation proceedings is referred to in the opinion of Judge Lacombe: (301)

"It is hereby admitted that Brice Alan Miller and others "composing the firm of Gibbs & Company, of Valparaiso, "Chile, appeared personally or through their authorized "agents, Henry Hucks Gibbs and others, composing the firm "of Anthony Gibbs & Sons, of London, England, in a certain "proceeding instituted in the High Court of Justice, Admiralty "Division, by James Fisher and others, owners of the Thirl-"mere, against the owners of the ship Andrew Johnson and "others, to limit their liability, as owners of the Thirlmere, for "the loss of the ship Andrew Johnson and her cargo by colli-"sion with the Thirlmere, and that in said proceedings the "libellants, Brice Alan Miller and others received the propor-"tion of the value of the ship Thirlmere which was adjudged "to them as owners of the cargo laden on the Andrew Johnson.

"This admission may be read and accepted in evidence in "this cause in this Court or in any other Court in which it may "be deemed material and relevant, and in which further proofs "may be permitted."

Dated New York, July 11, 1894.

BUTLER STILLMAN & HUBBARD,
Proctors for Libellant.

Annexed hereto is the brief of respondent on the trial of his appeal, and it is respectfully submitted herewith.

April 24, 1895.

GEO. A. BLACK,
Of Counsel for Respt.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

BRICE ALAN MILLER, *et al.*,
Libellants and Appellees,

vs.

EDWARD E. O'BRIEN,
Respondent and Appellant.

BRIEF FOR RESPONDENT.

Preliminary Statement.

This case brings up for adjudication the law of Bottomry and Respondentia, involving the authority of the shipmaster to pledge **the cargo transhipped by him on another vessel** (because his own vessel is incapable of carrying it), *for the cost of repairs to his own vessel.*

Statement.

Gibbs & Co., of Valparaiso (119) chartered (89) the American ship **Andrew Johnson** to carry a full cargo of nitrate of soda from Iquique and Caleta to a safe port in Europe, and loaded 19,943 bags of soda weighing 58,887 Sp. quintals, for which two bills of lading (85 to 89) were signed by **J. H. Killeran**, master, agreeing to deliver at Hamburg to Anthony Gibbs & Sons of London (119).

The **A. J.** sailed for Hamburg; met with heavy weather (79) and put in to **Callao, Peru**, as a port of refuge and repair

(79), where surveys were held, the first Aug. 4, 1884 (93 to 96), the second Aug. 23, 1884 (97 to 102). The second survey recites that the vessel had been lightened, "*having discharged about "900 tons of the cargo*" (97), recommended certain repairs and added (100):

"Taking into consideration the nature of the cargo, the "enormous strain it must bear on a ship of the dimensions of "the **A. J.**, *we are unanimously and decidedly of the opinion* "**that at least 1,200 tons of the cargo be for-**"**warded in another bottom,** and that with the above "repairs **and thus lightened,** she can proceed on her "voyage with safety. *This we consider to be in the interest of "both the owners of ship and cargo.*"

The recommendations of the surveys were carried out (81) and 8,449 bags of soda were transhipped by Capt. Killeran on to the Br. ship **Mary J. Leslie,** under a bill of lading dated Sept. 25, 1884, signed by Capt. McLeod (53 to 57), which agreed to deliver the soda at Hamburg to the same consignee; referred to conditions of the **A. J** charter-party and was endorsed:

"The 8,449 bags of nitrate of soda as per this bill of lading "are **included in and JOINTLY responsible with** "**the nitrate of soda specified in the Bottomry** "**and Respondentia Bond given to Messrs.** "**Grace Bros. & Co. AS SECURITY FOR THE** "**PAYMENT OF THE AMER. SHIP ANDREW** "**JOHNSON'S DISBURSEMENTS IN CALLAO.**"

The bond above referred to was given by Capt. Killeran (83) to Grace Bros. & Co.; it is set forth at fols. 39 to 51, and *recites the above recommendation of the surveyors to tranship* (42), the transhipment to the **Mary J. Leslie** (43), the debts incurred for repairs (43), the agreement of Grace Bros. & Co. to lend to Capt. Killeran "*upon his executing this present bond or obligation*, "and hypothecation of the said vessel, her boats and apparel, *and* "*her cargo, including that portion of the cargo transhipped* "*to, the Mary J. Leslie*" (45), and further reciting that "said "Grace Bros. & Co. are **contented** to stand to and bear *the* "*risk, hazard and adventure thereof* upon the hull, body or "keel *of the said vessel Andrew Johnson*, her boats, tackle, "apparel and furniture, together with the cargo laden on board "as aforesaid," and thereupon Capt. Killeran mortgages the "said vessel * * and her cargo, *including that portion* "*of the cargo transhipped to the Mary J. Leslie.*"

Then follows the condition or defeasance clause, providing for payment, in these words: (47) "If the **said vessel** shall forth- "with set sail from Callao aforesaid and without unnecessary "delay or deviation proceed on *her* intended voyage to Ham- "burg, and if the above bounden **James H. Killeran,** "shall and do within the space of five days next after the "arrival of **the** vessel at her final port of destination, * * "well and truly pay, &c., £2,212, 5s. 9d. * * principal * * and "£387 3s. maritime interest * * together £2,599 8s. 9d. * * "(49) **Or if during said voyage an utter loss of "the SAID vessel** by * * the perils of the sea or navi- "gation or any other casualty **shall unavoidably hap- "pen** to be sufficiently proved by the said James H. Killeran, "then and **IN EITHER OF SAID CASES** this obliga- "tion shall be **void.**"

The deposition of *Mr. O'Brien* (106) shows that he was the owner of the **A. J.** and (110) had knowledge **before the loss** of the **A. J.** of the above bond, but he could not say that he had that knowledge *before* she sailed from Callao.

Libellants made no proof that the cargo owners had any notice *at any time of the distress of the A. J. or of her need of funds, to be raised by bottomry of cargo.*

There was telegraphic communication (112). The *shippers and owners*, Gibbs & Co., were of Valparaiso, **Chile** (119). The consignees, Anthony Gibbs & Sons, of **London** (119).

After sailing from Callao the **Andrew Johnson** was sunk in mid-ocean by the Br. ship **Thirlmere** (84) and with all her cargo lost.

The A. J. was worth $60,000 (109), and insured for $30,000, valued at $60,000 by the Boston Marine Insurance Co. (see policy 107), and that company paid the $30,000 to Mr. O'Brien January 6, 1885, and received back from Mr. O'Brien on April 2, 1886, as their share of the recovery from the owners of the **Thirlmere** $11,456.08, and about June 28, 1886, $35.60 (116).

The collision suit was prosecuted by Mr. O'Brien at an expense of $5,511 (115) and produced net for loss of vessel and freight about £5,000 (114), the owners of the Thirlmere having limited their liability, by paying into the English Court of

Admiralty £13,685 (254), of which Gibbs & Co., the cargo owners, were allowed more than one-half (259).

The Mary J. Leslie.

This ship arrived at Hamburg on Feb. 5, 1885 (143), with the 8,449 bags of nitrate of soda, weighing 2,033,764 pounds German gross, worth 9s. 3d per hundredweight there (146). Hugo Wirtz, of Hamburg, acted as the agent of A. Gibbs & Sons (120), and a demand was made on him for payment *by the holder of the bottomry and respondentia bond* (141, 143) "*on "the fifth day after the vessel's arrival*" (144), and the matter being referred to the London principals (120), they wrote the letter found at fol. 125, offering to submit the matter to **arbitration,** which offer was accepted by Baring Bros. & Co., for the bondholder (127).

The Arbitration.

This chapter of events opens with the statement of A. Gibbs & Sons (120): "My firm *doubted* their obligation to pay the "amount claimed under the bottomry and respondentia bond "made by Capt. Killeran," but on Feb. 11th (six days after the arrival of the M. J. L., (and without any communication with Mr. O'Brien), A. Gibbs & Sons made the agreement to arbitrate, and the arbitrators—two Hamburg lawyers, Stammann for A. G. & Sons, and Wolffson for B. B. & Co. (145)—on March 14, made their award (156 to 158), not based on the language of the bond, but on the *assumed* intention of the parties.

The Construction of the Bond by the Arbitrators.

The arbitrators divided their award into two parts. (**1**) Was the cargo on the *M. J. L.* liable for the *whole* of the money loaned at Callao?

This query they readily answered in the affirmative.

In doing so they did not enter into any examination of the facts to establish that the expenditure at Callao was necessary, nor *how much* of it was necessary, nor why the cargo shipped on the M. J. L. should be pledged to pay for the repairs to the A. J.

They gave but one reason (156), because "according to the "law here, ship, freight and cargo of the A. J., as well as the "portion of the cargo which was transhipped into the M. J. L., "are **JOINTLY** liable."

By § 692 of the German code (177) "all the bottomried "objects are jointly and *severally* liable to the bottomry "creditor."

This provision can only apply to German vessels.

But by § 507 "the master has only the right to hypothecate "the cargo * * when, **and in so far** as it is necessary "for the purpose of prosecuting the voyage" (fol. 189).

By § 686, the **necessity** is required to be established in the manner therein pointed out, and thereupon "it shall be "considered that the master has been duly authorized" (fol. 173).

(**2**) Was the loss of the **A. J.** an avoidance of the bond?

On this head the arbitrators said:

"*Some doubt* might be raised as to whether, according to the "wording of the bottomry bond, the money was not lent, or "*appear to be lent*, contingent upon the safety of the **A. J.**, "and becoming due only after *her* arrival at her port of des- "tination, but becoming null and void* in the event of her non- "arrival. We are of the opinion, however, that this interpre- "tation *is not consistent with the real intention of the con- "tracting parties*, and that the wording referred to has origi- "nated in the not sufficiently careful use and employment of a "form of bond which happened to be at hand" (157).

> **Note.**—It is obvious that the arbitrators have not construed the bond by the language used, but have assumed to make a new bond according to the *assumed* intention of the parties, and the very next sentence of the award shows this, and *shows also the blundering groping of illogical minds for reasons to misapply.*

"This seems the less doubtful to us *for this reason*, that if the "bottomry bond were interpreted in this manner *the cargo of "the Mary J. Leslie would be entirely liberated after the loss of "the Andrew Johnson occurred*†, and would not even bear a

*Queer grammar. What became null and void?

†Just here the *hiatus* commences. Of course the cargo of the M. J. L. would be liberated from all liability on the *bottomry bond.*

8. The District Court erred in holding that the bottomry bond was not avoided by the utter loss of the ship Andrew Johnson.

9. The District Court erred in not holding that at the payment by libellants of the bottomry bond was a voluntary payment of an unfounded and illegal claim.

10. The District Court erred in overruling respondent's exceptions to the libel.

11. The District Court erred in refusing to allow respondent to introduce new allegations in his answer and refusing to receive new evidence before final decree.

THE ISSUES.

Two issues **of law** are presented by the *second* and *third exceptions* (58), which are really decisive of this case.

Shortly put they tell the Court:

(1). You have no *admiralty* jurisdiction.

(2). The story of libellants presents no legal claim of any kind.

Stripped of verbiage **the libellants' story** amounts to this:

"You loaded my cargo on your unseaworthy ship (24), which, "by reason of such unseaworthiness, put into Callao, and there "repaired, and to raise money to pay for those repairs your "master (Capt. K.), **signed** a paper, called a bottomry bond, "by which **he** bound your ship and all my cargo (part of which "he had put on board another ship, the M. J. L., because your "ship the A. J. could not by repairs be made fit to carry all of "it) (24), to pay five days after **his arrival in your ship** "at Hamburg. Your ship, A. J., sailed and was lost, with so "much of my cargo as remained on board, by a collision with "the Br. ship 'Thirlmere' solely by the fault of the T. (32).

"The M. J. L. sailed and arrived at H. with part of my cargo "and there the bondholder demanded that I pay the whole "amount of the bond, your master (Capt. K.) had agreed to pay "*after the arrival of your ship, the A. J.* (47), and which bond "was to be **void** if she was **'utterly lost'** (49), and I paid

" that bond because I *believed* it was properly made and I *be-*
" *lieved* I was bound in the law to do so, and I *believed* I could
" not get my cargo without doing so (31). **The reason**
" **I so believed is, I was not fully advised of the**
" **circumstances**" (29).

" It is true that my cargo was not *damaged* by any unsea-
" worthiness of your vessel, and that **you are in no fault**
" **for the collision. Your master (Capt. K.) had**
" **no authority to bind my cargo, and my cargo**
" **was not in truth liable to pay the bond**, and I
" have done a very foolish thing and parted with my money
" without any need to do so, but I want you to pay me back
" all the same *and with interest.*"

Does the above narrative show a cause of *admiralty* jurisdiction?

Does it show any cause of action?

Of course the **essential elements** of the libellants' complaint are:

(**1**) That a **lien** was *created* on their cargo on board the **M. J. L.**

(**2**) That that lien **existed** and was **enforceable against it after the loss of the A. J.**

(**3**) That there was a **personal** *liability* of respondent to repay to them some or all of the amount secured by that lien;

(**4**) Or, that the respondent became in some sort a **trustee** for libellants by reason of respondent collecting from the ship **Thirlmere** the amount recovered by him for the loss of the **A. J.**

If either there was **no original lien** on libellants' cargo or it **ceased to exist** by the defeasance clause of the bottomry bond (*i. e.*, "*utter loss* of the A. J.") taking effect, the payment by libellants would be a voluntary payment of a claim which had no legal foundation, and they must bear it themselves:

Or,

If the respondent was not **personally** liable (*i. e.*, if the remedy of libellants is *in rem* only), or if respondent was not a trustee for libellants in enforcing the claim against the **Thirlmere** the libellants have no claim against respondent.

These propositions must be examined separately.

Caution.—Much stress has been laid on the *imagined* fact that respondent has received a benefit (*i. e.*, an *increase of value*, see fol. 258) by the repairs at Callao, and that some *moral or equitable* obligation exists to repay the cargo-owner, who has repaid the bondholder, whose money paid for the repairs.

The only **evidence** on this head is Capt. Killeran's testimony at fol. 198:

"*Most of our expense was incurred in transhipping cargo*; "and the repairs made at Callao were not of a permanent "nature."

It goes without saying, that dock expenses, surveys, etc., are not *repairs* of a permanent nature. Of course libellants concede that they are liable for the expenses incurred for cargo, and they only seek to recover that part of the money which they say was spent for the repairs to the A. J. (see Art. 7 of libel, fol. 33) and so the D. C. decreed (237).

While libellants paid over $12,000 (31) they only claimed $7,870.16 (34) and they only got $6,091.73 (273).

PRELIMINARY OBSERVATIONS.

First Observation.—By the second exception (15) to the second libel (6) libellants had distinct notice that their libel did not allege communication with the *owner of the cargo* before the bottomry on cargo was given.

The libellants' third libel (8) *attempted* to supply this defect by alleging "that libellants *not being fully advised of the circum-* "*stances*, and believing that the bond was properly and neces- "sarily issued, *assented*," which allegation is repeated in their fourth libel (29) and this (5th Art. of libel) **is denied by the answer** (61), but *no proof was given that they were advised at all.*

Second Observation.—The libel alleges (Art. 4, fol. 25), the transhipment by respondent of 8,449 bags on the Mary J. Leslie and that the respondent, "*in place of tranship-* "*ping the remaining portion of his said cargo in other bottoms*, "and forwarding the same to destination, **which would** "**have been a proper course to pursue,** did, **FOR**

" **HIS OWN ADVANTAGE,** and not for the advantage of " the libellants," repair the A. J.

Nota Bene.—This allegation of the libel must be given its full weight in determining the exceptions. No proof was given either way.

I have said above that "if there was no original lien, or if it " ceased to exist by reason of the *utter loss* of the A. J. the " libellants paid in their own folly and must bear the loss."

Such is the law, as laid down in Naylor *vs.* Baltzell, Taney's D., 68. Taney, *C. J.*: " It appears from the evidence in this " case that the present plaintiffs" (cargo owner) "stood by and " saw the whole cargo sold without appearing in the Admiralty " Court to defend it, **and without requiring from the " lender any proof whatever of the necessity " of the case.**

" In either alternative, therefore, whether the necessity did, " or did not exist, it would be unreasonable and unjust to " charge the ship-owner with the loss of the cargo arising from " the hypothecation at Pernambuco. **If justifiable it was " made for the benefit of the cargo** * * * **if " not justifiable it was lost by the negligence of " the plaintiffs,** to whom it was consigned and **who took " no measures to protect it."**

THE LAW AS TO BOTTOMRY OF CARGO.

The first enquiry will be: " What law shall be applied?"

The **"Andrew Johnson"** was an **American** ship hailing from Thomaston, Me. (77), owned by a citizen of the United States (106), chartered to Gibbs & Co., described in the charter party (88) as of Valparaiso, **Chili** (but whose names indicate **Englishmen**), who owned the cargo (119) shipped at Iquique (86). At **Callao, Peru** (51), the bottomry bond was made to Grace Bros. & Co., described (39) as carrying on business at Lima and Callao, and was to be paid at **Hamburg** to Grace Bros. & Co. or order (40). The Mary J. Leslie was a **British** vessel (40).

In **The Julia Blake,** 107 U. S., 418, the J. B. was **British,** owned by Peter Blake, of **Nova Scotia.** The

cargo of logs was loaded at Rio de Janeiro, **Brazil,** and was owned by Philip Mee, of **Rio,** Brazil; and advances had been made on it by Cunningham & Sons, of **New York** (claimants of the cargo).

She put into the **Danish** Island of St. Thomas and there gave a bottomry on cargo to the Bank of St. Thomas.

Presumably the bond was payable in **New York** where the vessel arrived and with the cargo was libelled.

Judge Waite said (p. 426): "Whether the rule to the extent "it has been carried in England, is in accordance with the "general maritime law of Europe, other than Great Britain, "or whether, since the Julia Blake was a **British** vessel, the "authority of her master in a **Danish** port is to be determined "by the English law, instead of the general maritime law, or the "law of Denmark, are questions we deem it unnecessary to "consider, **for in our opinion, even under the most "liberal construction OF ANY RECOGNIZED "RULE which can be invoked for the authority "of the master OVER THE CARGO, this bond "cannot be sustained."**

The Supreme Court applied all rules to the facts of the Julia Blake's bond on cargo, and found that the bond was **outside** of them all, and therefore void. It is therefore enough to condemn the A. J's bond *on cargo* to show that the same facts exist and therefore the same law applies to them.

Judge Waite, proceeding to develop what the recognized rules were, said (p. 426): "The master can neither sell nor *hypothecate* "*the cargo*, except in case of urgent necessity and *his authority* "for that purpose is *no more* than may reasonably be implied "from the circumstances in which he is placed.

"He acts for the owner of the cargo because there is a neces- "sity for some one to do so and *like every agent whose authority* "*arises by implication of law*, **he can only do** what the "owner if present **OUGHT** to do. **Necessity** develops his "authority and **limits** his powers."

Judge Waite then showed what the "*necessity*" was, and (p. 427) quoted from Judge Washington in **Ross vs. the Active,** 2 Wash. C. C., 237. "But at all events the *necessity* "must be such as to connect the act with the success of the

"voyage and not for the exclusive interest of the ship owner," and also (p. 428) quoted from the **Amelie,** 6 Wall, 27. "And "this *necessity* is a question of fact to be determined in each "case by the circumstances in which the master is placed **and** "**the perils** to which the **PROPERTY is exposed.**

"*If the master can within a reasonable time consult the "owners he is required to do it,* **because they should have an opportunity to decide whether, in their judgment,** a sale is necessary.

Nota Bene. If judgment is to be exercised, knowledge of the facts is essential, and when libellants allege in their libel (29) "*libellants not being fully advised of the circumstances* * * "*assented*"—they show that they had an absolute defence to the bond in question.

The libellants when they allege (25) that a transhipment of the entire cargo "*would have been a proper course to pursue,*" and that respondent repaired the A. J. "*for his own advantage* "*and not for the advantage of the libellants,*" they also negative the idea of a *common* interest calling for expenditures which would justify pledging the cargo.

Judge Waite then (p. 430) considered the facts of the Julia Blake case and said: "She came in dismasted and leaky 'for a "'general equipment and refit' **with a cargo substanti-** "**ally imperish able,** which might be forwarded in "another vessel at comparatively small expense, and it must "have been easy to see that to repair the vessel **at the risk** "**of the owner of the cargo,** would be to place his "interests in jeopardy *without any urgent necessity on his* "*account.*"

"No master who 'held the balance evenly between his two "'principals,' could have believed himself justified under the "circumstances, in hypothecating the cargo for any such pur- "pose, **without notice to the owner."**

Nota Bene.—What closer parallel could be found between facts? The *nitrate of soda* on the A. J. was just as **imperishable** as the logs on the J. B., and all could have been as easily forwarded as the part on the M. J. L.

At all events the burden lay on the libellants (whose claim arises out of the peculiar position they had put themselves in

by paying the bond) *to establish all the facts* necessary to give it validity. This also is established by the "Julia Blake" where Judge Waite said (428) "Before there can be a recovery "against the owner, *it must be shown* that the circumstances "were such as to make it *apparently proper* for the master to "do what he has done."

"To this extent the burden of proof is clearly "on the lender. The Aurora, 1 Wheat, 96; Thomas *vs.* "Osborn, 19 How., 22; The Amelie, 6 Wall., 18; The Grape-"shot, 9 *id.*, 129; The Lulu, 10 *id.*, 192. In these cases the rule "was applied to the hypothecation *of the ship* by the master, "**where less strictness will ordinarily be re-**"**quired,** than in the hypothecation of the cargo *because the* "*master is the* **appointed** *agent of the owner of the ship*, "but the **involuntary** agent of the owner of the cargo."

Judge Waite on the same page had already stated that "a "lender is *presumed to know that the power of the master is to* "*be determined by the necessities of the case, in their legal* "*operation on the owner of the cargo.* As necessity creates the "agency, and **that only can be authorized** *which* "*under the circumstances, is reasonable and just*, he must "make his own inquiries and judge for himself **and at his** "**own risk,** whether, if the owner were present he **would** "**do or ought to do that,** *or something equivalent, which* "*the master is undertaking to do for him, in his absence.*

Three propositions of law are thus established:

1. The facts showing *necessity* must exist.

2. The bondholder *has the burden* of proving the existence of the necessity.

3. *Strict* proof is requisite.

And when all the above has been complied with *the bond-holder has yet to show* the **fundamental fact,** that the cargo-owner has had a fair opportunity of exercising his judgment.

Caution. It is necessary to avoid the possibility of confusion arising from the master being the agent of two principals. What he does as agent by necessity for the owner of cargo is binding only if within this implied authority, but is in no sense

the act of the owner of the ship—or capable of creating a *personal* obligation on him.

The ship Virgin (1834) 8 Peters, 554, Story, *J.*: "But "beyond this (*i. e.* value of the pledge) there is no *personal* obli- "gation upon the owners."

The English Cases.

Judge Waite, in the *Julia Blake*, 107 U. S., 426, cites:

The Casa Marittima, 2 Ap. C., 156.
The Bonaparte, 8 Mo. P. C., 459.
The Hamburg, 2 Mo. P. C., N. S., 289.
Cargo ex-Sultan, 1 Swabey, 504.
The Gratitudine, 3 C. Rob., 261.
Duncan v. Benson, 1 Exch., 557.
The Onward, L. R., 4 Ad. & Ec., 57.

I add extracts from some of the above, and others more recent, and call attention to the discussion of principles therein.

The Lizzie, (1868) L. R., 2 Ad. & Ec., 254.

The Lizzie, wood-loaded, from Minatitlon to Liverpool, put into Key West in 1865 to repair sea damage.

The master, before hypothecating the cargo, **did not** communicate with the cargo-owner, "by reason of the great delay "and uncertainty in the transmission of letters from Key West, "**at that time**" and raised money on bottomry of vessel, freight and cargo, for which *they were all* libelled on arrival at Liverpool. The case went by default against ship and freight, but the cargo-owner contested the validity of the bond, which was enforced by Sir Robt. Phillimore, who said, p. 260: "I "rememember that, while by a decision in favor of the validity "of this bond the interests of the *bona fide* lender will be pro- "tected, *the owner of the cargo has* under the authority of Dun- "can *vs.* Benson, 1 Ex., 537; 3 Ex., 644; **his remedy over** "**against the owner of the ship.**"

> **Nota Bene.** In this case the vessel arrived safely. Whether that fact would give a right of action against the owner **in personam**, is a point of law on which the English authority differs from the American. Conceding (but not admitting) that the cargo-owner might have a lien on the vessel, goes very little way to establish the *personal* liability of the ship-owner.

Sir Robt. Phillimore based this decision on *the special cir-*

cumstances, saying (p 259): "Upon the whole I am of "opinion that the circumstances of this particular case, do not "bring it within the principles *which render a communication "from the* master to the *owners* **a necessary PRECE-"DENT CONDITION** *to the validity of a bottomry bond "which hypothecates the cargo.*"

At p. 258 he says: "Now the principles of law which I must "apply to this case are those laid down by the Lords of the "Privy Council in the Buonaparte, 8 Moore P. C., 459* and the "Hamburg, Brown & Lush., 253.

"**There is no doubt** that, according to the authority of "these cases, as well as that of the Gratitudine, 3 C. Rob., 261, "which they followed, "the character of **agent for the** "'**owners of the cargo,** is imposed upon the master by "'the necessity of the case and by that alone.' And by the "two former cases it has been established as a **necessary** "**consequence** of that proposition, that the master, **before** "he hypothecates the cargo ought, if he have according to "reasonable intendment the means of doing so, to communicate "with the owner.

"For what purpose?

"It has been said by the counsel for the bondholder, merely to "give the *owner* an opportunity of advancing the requisite "funds; but I cannot think that this is the only ground which "necessitates the communication. Another ground would "surely be **to give him the opportunity of unlad-"ing the cargo altogether.** I think, indeed, he could "not do this without payment of the entire freight. I am not "aware of any English decision directly upon this point, but "the language of jurisprudence appears to be in accordance "with the Rhodian law:

"'Si vero mercator eximere merces voluerit naulum integrum "'exercitori solvat'.

"'Dès qu'une fois', Boulay-Paty observes 'l' affréteur a "'commencé à charger ses marchandises dans le navire, il ne "'peut plus les retirer qu'en payent la totalité du fret con-"'venu, si le navire part *à non chargé* (Cours de Droit Mar., "'Vol. 2, p. 380, ed. 1834.')"

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*In Kleinwort *vs.* Casa Mar., 2 P. C., 157, it is pointed out that the report of the Buonaparte in 8 Moore P. C. is defective, and the correction is there given.

"*If there be an opportunity for the owners to express their "will as to either of these two grounds with respect to their "cargo, the master,* **who is the agent, of necessity "and not of their choice,** *has no right to deprive them "of this opportunity, and, therefore, must communicate with "them if it be reasonably within his power to do so.*

"In the case of the Hamburg, Brown and Lush., at p. 274, their "Lordships said: 'Where the cargo belongs to a single "'individual, known to the master, the ship in a port in the same "'country, or near to it, in which that owner is resident, the "'means of communication sure and speedy, the probable "'delay inconsiderable, the cargo not of a perishable kind, the "'money to be borrowed so large as to be sure to bring it with-"'in the operation of the bond, *it could not be contended that "'the master could properly hypothecate it for the repairs of "'the vessel without* **first communicating with the "'owner.**'"

At p. 256, Sir R. P. states another limitation on the *agency* of the master as follows:

"The true question is whether, having regard to all the "circumstances it is such an agreement *as an honest and pru-"dent master* would, for the *benefit of* **all** *parties*, the owners "of the ship as well as of the cargo, have entered into."

In the **Karnak** (1868), 2 Ad. and Ec., 293, Sir Robert Phillimore examined the origin and growth of the bottomry (so-called) of cargo, and pointed out that it was "*built up slowly*" by the judges, who derived the material of their decisions from that excellent source "**the reason of the thing.**"

He further says: "This power of the master arises out of his "relation as agent, both to the owner of the ship and to the "owner of the cargo. *A material distinction*, indeed, *exists "between his authority as agent for the one and as agent for "the other*, but in both cases his power to hypothecate, like "his power to sell, *arises out of the necessity of the case.*"

At p. 308, Sir R. P. says that the doctrine of the necessity of communication by the master with the cargo-owner is peculiar to the English law.

At p. 309 he refers to the Lizzie (*ante* p. 254), and says the duty to communicate "arises from the peculiar character of his "(master's) relation as agent for the shipper, a relation forced "upon him for the nonce by a temporary necessity, **and,**

"**therefore, different from his original and** "**abiding relation as agent for the owner of** "**the ship.** * *

"The law looks with jealousy upon the exercise of authority " by the master over the cargo."

At p. 310, Sir R. P. quotes Lord Stowell in the Gratitudine (3 C. Rob., p. 261). "'In all cases **it is the prospect of** "'**benefit to the proprietor that is the founda-** "'**tion of the authority of the master.** It is, there-"'fore true that **if the repairs of the ship produce** "'**no benefit or prospect of benefit to the cargo,** "'**the master cannot bind the cargo for such** "'**repairs.**'"

The Karnak (1869), 2 P. C., 515. Sir Wm. Earle: "The " learned counsel also urged as an argument, the policy of the " law in making bottomry a good security, *but it must not be* " *made a good security by violating the rights of others.*"

The Panama (1870), L. R., 3 P. C., 199: The Panama was chartered at Liverpool for a voyage to Cuba and back. £500 was to be advanced in England and F. (her owner) was to give a second mortgage to secure the advance, which he did.

The Panama loaded outward for Cardenas, consigned to Finlay & Co., of Havana, delivered her cargo at Cardenas, was subchartered to load from Trinidad de Cuba back to Liverpool by Finlay & Co., who advanced £250 as provided by charter, and also a further advance of £250. After loading at Trinidad de Cuba the master, without communicating with his owner, made a bottomry for £318 in favor of the charterers (B. & H.) and sailed; put into Cardenas in distress, where the master threatened to sell cargo, and, upon news thereof, Finlay & Co. telegraphed charterers (B. & H.), who instructed them to advance on bottomry, and a new bottomry for £741 was executed by the master. **No attempt was made** to communicate with **the owner or the first mortgagee,** and the vessel being libelled for the second bottomry (the first being abandoned), the first mortgagee contested (p. 201), and on a reference to the registrar he reported that **the bond was invalid** because no communication had been given to the owner or mortgagee, and Sir R. Phillimore having affirmed the registrar

(2 Ad. & Ec., 390), appeal was made to the P. C., where the cause was heard by Lord Romilly (M. R.), Sir J. W. Colville and Sir Jos. Napier (p. 199, note).

The Master of the Rolls delivered the opinion, and said (p. 203): "*It was absolutely necessary in this case to give* "*notice to the owner* * * . Their Lordships think that this "is not a technical matter, but a matter of substance."

Australasian S. N. Co. *vs.* **Morse** (1872), L. R., 4 P. C., 227. Ship Boomerang, loaded with wool, belonging to nineteen different consignees at Sydney, struck a rock near Rockingham (900 miles from Sydney, p. 224) and filled. The disaster occurred on Dec. 21 (Thursday), and on Dec. 26 (Sunday and Christmas Day intervening) the wool was sold by the master without communicating with the owners of the wool.

The suit was for a conversion of the wool (p. 223).

Sir Montague Smith pointed out (p. 235) that the ship was a *general* ship, and thought that made a difference in the *degree* of diligence the master owed, and he also pointed out the fact that Sunday and Christmas intervened and thought the jury justified in finding the master *excused* for not telegraphing, saying (p. 234): "**There can be no doubt that the** "**master is bound to employ the telegraph** as a "means of communication where it can be usefully done."

Smith vs. Bk. of N. S. Wales (1872), 4 P. C., 194. Bottomry on ship Staffordshire and freight from Melbourne to Callao *and from thence to any other port or ports* payable 7 days after her arrival at Callao (p. 197). Lord J. Mellish (209): "It is objected that though the bond may be generally good, "yet it *is bad as respects subsequent freights* * * (p. 210) and "their lordships are of opinion that subsequent freight cannot "be hypothecated for this reason: That by the very nature of "a bottomry bond the person who takes it is to become "liable for the maritime risk, and therefore **nothing can** "**be hypothecated except something which is** "**in danger of perishing by maritime risk dur-**"**ing the time that the bond is running.**"

> **Note.**—The cargo on the M. J. L. was not at the risk of the bondholder, for his debt would not be lost by the loss of the cargo of the M. J. L. so long as the cargo of the A. J. still remained liable for the loan.

The Onward (1873), 4 Ad. and Ec., 38. The Am. ship O. put into Mauritius in distress (p. 39). After repairing, her master gave a bottomry on vessel, freight **and cargo** for £6,238. The master notified his owners, but neither he nor they notified the owner of the cargo before the bond was given and the ship had sailed (p. 49). *Cargo owner defended* (p. 39).

Sir R. Phillimore (p. 42) said, p. 51: "According to the "law the master is **always** the agent for the ship, *and in* "*special cases of necessity, the agent for the cargo also.* He "is the *appointed* agent to the former, the involuntary agent of "the latter. From these principles of jurisprudence two im- "portant consequences flow:

"First: When the circumstances permit, the master **must** "communicate with the owner before he does any act which "seriously affects the value of the ship in the one case *or of the* "*cargo in the other.*

"This is a doctrine at which **the English courts** have "**SLOWLY** but steadily arrived * * (p. 52). The owner "might well have thought it for his interest either to advance "the requisite funds for the repairs *or, to pay the full freight* "and to embark it in another vessel."

Judge Phillimore then speaks of the suggestion that the cargo-owner can pay and recover from the ship-owner, and says (p 52): "He is domiciled in New York and I cannot discover "that the doctrine of the English decision in Duncan *vs.* Ben- "son, 3 Ex., 644, has ever been judicially recognized in that "country.

> **Note.**—Judge Phillimore had held the bond was valid in the "Lizzie" E. R., 2 Ad. & Ec. 254, saying at p. 260: "I remember that while by a decision in favor of the "validity of this bond, the interests of the *bona fide* "lender will be protected, *the owner of the cargo has* "under the authority of Duncan *vs.* Benson, 1 Ex. 537, 3 "Ex. 644, **his remedy over against the owner "of the ship."** The contrast of these two decisions affords a curious study for the critic. They do not seem based on any settled rule of law.

"*A communication was, therefore, in my opinion indispens-* "*able in the circumstances of the case to the validity of a bot-* "*tomry bond on the cargo.*"

Nota Bene. Here was an American ship in a French

port with an English cargo borrowing on bottomry from Houdlette & Co., merchants, residing at Port Louis (p.39).

Sir R. Phillimore then cites the **Oriental**, 7 Moo. P. C. 398, where the P. C. reversed Dr. Lushington and held a bottomry void for want of communication, and quotes Sir John "Jervis: "Here being the means of communication **AND** "**THE AUTHORITY OF THE MASTER BEING** "**FOUNDED ON THE IMPOSSIBILITY OF COM-** "**MUNICATION,** their lordships are of opinion that there "was no authority in the master to raise money on bottomry."

> **Note.**— By § 504 of the German Code (fol. 188) it is made the duty of the master to see "*that those interested* "*in the cargo are speedily informed of such occurrences* "*and of the measures thereby rendered necessary.*

Sir R. Phillmore also refers (p. 56) to the case of the "Lord Cochrane," 2 W. Rob., 333, which he says was "*decided in 1844* "**before** the law as to the necessity of communication had "been distinctly laid down."

And at p. 57 he discusses the limits of the master's authority to represent and bind the cargo owner, saying:

"The next consequence from the doctrine of agency is that "the master must sustain to the best of his power the interests "of the absent owners. *This is a principle of general mari-* "*time law*, and not like the former one of English law only. "Boulay Paty observes: 'Il est le représentant des chargeurs "'absens; il *doit* faire ce qu' ils feraient euxmêmes s' ils "'étaient sur les lieux,' Coms de Droit Com. Mar., tom. 2, p. "404, ed. 1834—that is, he *must do* that which there is fair rea- "son to suppose the owner, if present, would do. 'Il est donc' "(Emerigon says), '*obligé* de faire ce qu' il est à présumer que "' feraient les chargeurs s' ils etarent présens.'

"The master is to remember the **foundation of his au-** "**thority** *to give a bottomry bond on cargo, is the prospect of* "**benefit,** *direct or indirect, to the proprietor of it.*" **This principle limits the authority of the master in this matter**, and he quotes Lord Stowell in the "**Grati-** "**tudine,**" 3 C. Rob., 261, "that if the repairs of the ship "produce no benefit, or prospect of benefit, to the cargo, the "master cannot bind the cargo for such repairs." (A sentence Sir R. P. had already quoted in the Karnak (1868), 2 Ad. and Ec., 310.) Bond declared void.

Kleinwort vs. Casa Mar. of Genoa (1877), 2 Ap. C. 156.

Appeal to P. C. from Sup. Ct. of Ceylon. Appeal heard by Ld. Blackburn, Sir J. W. Colvile, Sir Barnes Peacock, Sir M. E. Smith and Sir R. P. Collier. Opinion delivered by Sir Montague E. Smith.

Ship Maria Louisa sailed from Rangoon, with rice, to Cowes, for orders, in July, 1872, and in September, 1872, put into Trincomalee in distress (p. 158) and repaired, and the security of the ship alone *not being sufficient* for the advances, bottomried hull, freight and cargo to the C. M. of G. on March 12, 1873 (p. 159).

The cargo was landed in T., stored and reshipped in good condition (p. 159).

The ship sailed April, 1873, put into Pt. de Galle in May, and in August, 1873, the cargo was sold at Galle in a perishable condition (p. 160). An action was brought on the b. bond, and the cargo owner defended (156), and judgment was given against the bond in the lower court, reversed in the Supreme Court, and appealed by cargo owner.

Sir M. E. Smith (p. 158) cited the Onward, 4 A. and E., 55, and the words of Sir John Jervis, in the Oriental, 7 Moo. P. C., 411, quoted by Sir R. Phillimore, and the conclusion he came to and added : " In this view of the law their Lordships *entirely* agree," and at p. 160 said :

" The duty of the master to communicate with the owners, " or those who may be fairly taken to represent the owners, be- " fore taking this *extreme* step, being plain, let us see what he " did," and at p. 162 criticised the judgment of the Court below in holding that it became the duty of the cargo owner, on hearing of the ship's distress, *to offer money*, and said :

" Their Lordships think no such duty was imposed upon " Gerber, Christien & Co. (cargo owner)."

The **Pontida** (1884), 9 P. D., 177, came before the Court of Appeals (Brett, Bowen & Fry, J. J.,) on an appeal from Butt, J. (9 P. D., 102)—The P. was an Italian vessel, and the bottomry was given to an Italian banker at St. Michael, and covered hull and cargo. The cargo owners resisted as to the *amount* of the bond, which was reduced by the Registrar and merchants by £700, and their report was confirmed by Butt, J. (p. 105). On appeal by the bondholder Brett, M. R. commented

on the *principles* on which the Court proceeded in such cases, saying (p. 178): "When an action is brought on a bottomry "bond the *first question* is, whether the Court will decree for "the bond **at all.**

"It does not follow that *because the bond exists* the Court "will recognize its validity, *for this depends upon the prelim-* "*inary inquiry* **whether the bond was entered** "**into in a manner to bind the owners at all.**

"This jurisdiction of the Court has been of extreme import- "ance to shipowners and cargo owners, for a long series of "cases has shown that *if the Court exercises its jurisdiction* "*with* the **laxity** ship-owners and *cargo owners* will in some "circumstances be **practically robbed.** * * * There- "fore the Court has always looked strictly into a bottomry "transaction, and has refused to pronounce for the validity of "the bond *unless* it was entered into in *good faith.* * * *

"(**P. 179.**) The question of *bona fides* affects only the *pri-* "*mary* question whether the bond is **at all** valid or not.

"But if the bond has been pronounced to be valid * * it "will be **bad** *as regards each item, to the extent by which* "*such item exceeds the amount* **which was actually** "**necessary.** * * *

"(**P. 180.**) The question of reasonable inquiry by the lender "has never been the test of the liability of the ship-owner.

"I think, with deference to the Privy Council, that their "language in Prince of Saxe Coburg, 3 Moo. P. C., 1, was not "quite so precise as could have been wished; I think that the "language in that case applies to the *bona fides* of the lender, as "affecting the validity of the bond *ab initio* and *whether it* "*should be pronounced for at all.*

"For if a bond is entered into without the least care or "inquiry, or with the intention of imposing on the ship-owner, "it justifies the Court in declaring it to be void.

"But the rule that a bond *though valid*, is so only to the "extent to which money is **needed** for the actual necessities "of the ship, **is founded on the doctrine that,** by the "law of England, **the master in a foreign port has** "**NO AUTHORITY to bind the ship-owner or** "**CARGO-OWNER except in case of NECESSITY.** The rule should be even **more stringent as regards** "**the cargo-owner,** for the master does not take the goods

"on board as his agent **and is not his agent at all,** "**unless an OVERRULING necessity** arises during "the voyage."

Bowen, *J.*, concurred, saying (p. 180): "The master is only "the agent to bind the cargo-owner in the hour of necessity, "**and his AUTHORITY must be measured by** "**this principle.**"

And at p. 181, he points out "that the opinion of the lender "cannot **extend** the authority of the master."

With the foregoing enunciation of the law to guide the judicial investigator in the solution of the question in hand, let us see what the status of the *bondholder* of this bottomry-bond would be if now seeking to enforce it against the cargo of nitrate on the **Mary J. Leslie.**

1. He must prove a communication of the facts sufficient to allow the intelligent exercise of the judgment of the cargo-owner.

And he has not done so.

2. He must prove a *necessity* in respect to this *imperishable* cargo.

And he has not done so.

3. The proof must be *strict.*

4. If the matter is left in doubt in any degree, as the burden of proof is on him, he has failed to establish the authority of the master to bind the cargo and therefore has failed to establish a lien on it.

The E. I. Morrison, 153 U. S., 212.

"If the determination of this question is left in doubt, that "doubt must be resolved against them."

By a singular oversight the District Judge utterly failed to consider **whether the bond was a good bottomry of cargo,** although his attention was directed to the necessity of notice to the cargo-owner by the exception (15) which he disposed of as insufficient (203), overlooking the fact that the averment of the fact was essential, and making the *obvious* mistake of accepting a statement of a *conclusion of law* (*i. e.*, "*lawfully executed*") as the equivalent of the allegation of a fact.

Bonnell *vs.* **Griswold** 68 N. Y., 298. "Facts and not conclusions of law are admitted by a demurrer." Dillon *vs.* Barnard, 21 Wall., 430.

Judge Brown speaks of the "averments that the expense incurred was necessary" (204). The last amended libel speaks of "expenses in making *necessary repairs*" (26) which is by no means the equivalent of a *necessity as to cargo*, nor would it justify or excuse the failure to inform the cargo-owner so that he might intelligently exercise his judgment.

To summarise. The cargo on the M. J. L. was not pledged by a valid lien:

(1) Because no necessity existed to justify the master of the A. J. binding it for repairs to that vessel.

(2) Because no notification of all the facts was given to the cargo-owner.

(3) Because the *burden* rested on the bondholder to prove by *strict* proof the necessity and the due notice.

Therefore the cargo-owner paid the bond without justification.

THE ERRORS OF THE DISTRICT JUDGE.

Although an admiralty appeal is a new trial, "*completely and entirely new*" (The Chas. Morgan, 115 U. S., 75), yet the arguments advanced by the learned District Judge have to be met and overcome, and all the more so because they are the *judicial* view as distinguished from that of the paid advocate, and therefore are received with less scrutiny by this court.

1. As heretofore pointed out, Judge Brown accepted the *validity of the bond as creating a pledge of cargo* without discussion, and confined his attentions to the language of the *defeasance clause* (1st Opin., 204 to 213; 2d Opin., 225 to 230).

2. In his first opinion (207) Judge Brown says: "*The construction of the instrument itself is not free from difficulty*," and points out that by the *recital* in the bond (45) Grace & Co. "*are* **contented** to stand to and bear the **risk, hazard**

" **and adventure thereof,** *upon the hull, body or keel* " *of the said vessel Andrew Johnson, her boats, tackle, apparel* " *and furniture, together with the cargo laden on board as* " *aforesaid and the freight to be earned and become payable* " *as aforesaid.*"

Yet he immediately proceeds to assume that they did not *intend* to be *so contented*, but meant to be contented with that *and something else.*

Judge Brown further quotes (208) the provision that the bond shall become void in two ways viz.:

(**1**) " If the above bounden James H. Killeran" (Master of the A. J.) " shall within the next five days after the arrival of " the vessel" (on which he was master and which was to sail " '*forthwith from Callao*,' 46) " at her final port of destination " * * *pay* to Grace Bros. & Co., etc., etc."

" **or**"

(**2**) " *If during said voyage* **an utter loss** *of the said* " *vessel by* * * *perils of the sea* * * *shall unavoidably* " *happen* * * **then and in either of the said** " **cases,**" etc.; but he very strangely (although quoting the language) fails to give any effect to the very express words " **in either** *of the said cases*," saying (fol. 211): " I think " **that** the '*obligation*' that by the condition is to become void " may be fairly construed as intended to mean *only the personal* " *obligation*, or agreement to *pay* the loan, leaving the *pledge* " operative upon any salvage recoverable."

Note the *antithesis* of the *defeasance* clause: The bond is to be **void** " *in either of the said cases*" which cases are:

(1) The *payment* by Killeran.
(2) The *utter loss* of the A. J.

And yet Judge Brown construes it to be valid after the *utter loss*, as a *pledge* but not as a *promise.*

A judge who desires to get at the correct interpretation of a contract is permitted to put himself in the place of the contracting parties (*not of one, but of both*), and to do so may be informed what the attendant circumstances were.

Merriam *vs.* U. S., 107 U. S., 437.

If Judge Brown had done so, he would have found that Capt. Killeran was an agent with a *limited authority* who was bound

to secure for his absent principals all the advantages he fairly could, and that he was dealing with *lenders of money*, who, **in person,** protected their own interests as creditors, and did so *by taking a lien on the absent cargo owner's property with the satisfactory interest of* **seventeen and one-half per cent.** (48) **for a loan to be repaid in** *less than* **six months**,* and who in the bond (39) are recited to be *carrying on business* (*presumably* of a like kind and *presumably* with perfect familiarity with all its requirements) at Lima and Callao (the latter *recited* to be a *port*, meaning a sea-port). Further pursuing his researches, the learned Judge would have found that these creditors **knew** that the *competent* surveyors (42), as recited in the bond, had recommended that certain *repairs* be made to the Andrew Johnson, *but had likewise* (*presumably* at the same time) recommended that a portion of the cargo, brought by her to the port of Callao, be there transhipped to another vessel, and that these creditors **knew** that 1,200 tons of that cargo had been transhipped on the Mary J. Leslie, and **knew that that portion of the cargo was in no degree benefited by the repairs to the Andrew Johnson**, and **knew** that the master of the A. J. had no authority to pledge that 1,200 tons of cargo for those repairs.

Having thus put himself in the place of the contracting parties, a careful as well as learned Judge would then read the bond with due care, weighing its words as symbols used to *express* (and not conceal) the *real* intention of the parties, and when he came to the **attestation clause** (50) he would be struck by the fact that Capt. Killeran had signed it in *original*, in *duplicate* and in *triplicate*, and had only signed (mark the words) **"after careful reading"** (50) (*presumably of each*); so that the learned Judge must have been immediately and forcibly struck with the *inane* remark of the "doctors of law" who say (120), "The wording referred to has originated " in the **not sufficiently careful** use and employment of " a form of bond which *happened* to be at hand."

The learned District Judge did not think this bond truly expressed the *intention of the lenders*, and this *unilateral* view was fortified by the consideration that "this is a *maritime* in-

* The bottomry was made Sept. 15th, 1884 (41), and the M. J. Leslie's bill of lading was dated Sept. 25, 1884 (55), and she arrived at Hamburg Feb. 5, 1885 (143).

" strument, to be construed liberally in favor of the bottomry " lender."

Before contracts are changed by the courts it is usually requisite to show that they do not truly express the intention *of both parties.* The Sophie Wilhelmine, 58 F. R., 893.

The very precise and formal manner in which this contract is drawn and the obviously **intentional omission** of a clause " *reserving any average that might be secured upon all salvage* " *recoverable,*" which Judge Brown refers to (210), and says, on the authority of Ins. Co. *vs.* Gossler, 96 U. S., 646, "*is usual in* **such** *full and formal instruments,*" instead of impressing him with the conviction that the parties (both of them) knew what they intended and knew how to say what they meant, is the basis of a contrary conviction in his mind.

Ins. Co. vs. Gossler (1877), 96 U. S., 653. Clifford, *J.:*

P. 655. " Where the bond covers the cargo as well as the ves- " sel, the lender, **unless** *the condition is otherwise,* is entitled " to be paid, even if the ship is lost, if enough of the cargo ar- " rives in safety to pay the bottomry loan.

" * * The rule is that if the *ship* is once bottomried the bond " attaches to the very last plank, and the holder of the bond " may have that sold for his benefit. Abundant authority ex- " ists for that proposition, *and the court is of the opinion that* " *the* **same rule** *is applicable to the cargo* **IN CASES** " **WHERE IT IS, WITHOUT CONDITION,** *cov-* " *ered by the bond.*"

Nota Bene. Judge Clifford recognized the difference where the " **condition** " he speaks of exists; this is the distinction respondent invokes in this case.

Judge Clifford refers to the case of **Del. Ins. Co. vs. Archer** (1832), 3 Rawle, 216.

Action on memorandum for a *respondentia* contract for $17,000, the security to be either $17,000 in specie, or $20,000 value of goods shipped at par, if specie should not be shipped, " *in* " *which case the lenders should only be liable to average* **and** " **entitled to salvage** *as if it had been a specie ship-* " *ment.*"

Note.—The specific clause "*entitled to salvage*" is here again used.

P. 217. "It appeared that it was part of the condition of the "respondentia bonds in use in the Delaware Insurance Office "that *the borrower is to account for 'a just or proportionate* "*'average or salvage of the goods shipped, and which shall* "*'not be unavoidably lost by fire, enemies, men-of-war or any* "*'other casualty.*"

Gibson, *J:* "Every profession or business necessarily has its "technical language, because *having the signification of its* "*terms fixed beforehand* by usage and common consent *they* "*not only express the meaning of those who use them with* "*more precision*, but are more comprehensive and less liable to "misconstruction than popular terms which have not the same "advantage in respect of certainty.

"It seems, as I have already said, that the lender is not liable "to average by the principles of the English law, *and it is* "*therefore usual to dispose of the subject by* **a special** "**clause** *in the contract.* * * The words *average* and *salvage*, "of course, relate to a partial loss."

Wood vs. Fisk, 63 N. Y., 249 (1875), Miller, *J.:*

"The question as to what the statute intended does not arise, "*for whatever the intention may have been cannot affect the* "**LANGUAGE EMPLOYED, so as to** *give a con-* "*struction to the instrument* **in contravention of its** "**plain meaning."**

Judge Brown thinks (211) that the provisions of "**nearly** all the Maritime **Codes**" must be regarded as aiding the interpretation of this bond. Why?

Was this American shipmaster, who was *an agent by necessity* for the *absent* cargo-owners, making a contract with any reference in his mind to foreign Codes: if so, which of the **nearly** all? and why not the excepted ones? Judge Story said in **The Virgin** (1834), 8 Peters, 554:

"It has been *correctly* remarked by Lord Stowell (The Nelson, "1 Hag. Ad., 176), that the form of bottomry bonds *is differ-* "*ent in different countries* **and so is their authority.** "In some countries they bind the owners; in others they do "not. * * In England and **America,** the established "doctrine is that the owners are not personally bound, except to "the extent of the fund pledged which has come into their "hands."

Appleton vs. Crowenshield, 8 Mass., 348 (1811); Story, *arg.* said as to bottomry: "Further, it is not a contract "of an universal nature or governed by any *general* law; *but* "*by the mere stipulations of the parties* * * that **no** "**implied agreements are to be added**; and that "it is to be *construed*, like other contracts, by what the parties "have done and said."

1 Parsons on Marine Ins., 221:

"There is *no salvage* or general average upon a bottomry "bond," (*i. e. none unless specifically given*).

Joyce *vs.* Williamson, 3 Douglas, 164.
Robertson *vs.* United Ins. Co., 2 John. Cases, 252 (per Kent, *J.*).
Glover *vs.* Black, 3 Burr, 394; 1 Wm. Bl., 396.
Jennings *vs.* Ins. Co., 4 Binn., 251.
Ins. Co. *vs.* Duval, 8 S. and R., 138.

The **brig Ann C. Pratt** (1853), 1 Curtis C. C., 349, Curtis, *J.*, speaking of a bottomry-bond said: "Now this is a con- "tract of a peculiar character, distinguishable by very marked "characteristics from an ordinary loan.

"Pothier, *Contrat à la Grosse*, N. 6, says: 'It differs from "'all other contracts; it forms a particular species by itself.'"

"Boulay-Paty, in his notes to Emerigon on Bottomry (Vol. 2. "p. 417, Ch. 1, § 2), uses the following emphatic language: 'It "'is neither a sale nor a partnership, nor a loan properly "'speaking, nor insurance, nor a compound of different con- "'tracts, *undique collatis membris*—but it is a contract having "'a specific name—*un* contrat nommé—and a character peculiar "'to itself.'"

Judge Brown says (213) the cargo on the M. J. Leslie as respects the lien was on her "precisely as if it had been *rescued* "by the M. J. L. from the A. J. a few moments before the lat- "ter went down in mid-ocean." Is not this rather strained?

But the idea he is trying to work out is, that although the *usual clause* reserving the salvage to the lenders is omitted (210), yet they are entitled to have the benefit of salvage, and so he twists the cargo on the M. J. L. into *saved* cargo, and bound by the bond, although, as Judge Clifford points out in Ins. Co. *vs.* Gossler, 96 U. S., 655, the *cargo* is only subject

to salvage when the cargo is "**without condition,** covered "by the bond."

If the A. J. was lost with her cargo by sea perils, the cargo-owners would get their insurance and the bondholders theirs.

But if the bondholders can make the cargo on the M. J. L. pay the bond, the cargo-owner cannot make the insurer pay any part of *that sum*, for it is not lost by a sea peril.

See Greer *vs.* Poole, 5 Q. B. D., 272.

Judge Brown, in his first opinion, correctly stated the American doctrine that the "*master has no authority to bind the "owner"* * * "*beyond the value of the ship and freight that "comes to the ship-owner's hands.*" Citing **Naylor vs. Baltzell**; Taney's Dec., 55:

(So also says the Supreme Court, by **Story, J.**, in **The Virgin,** 8 Peters, 538), and on this ground Judge Brown sustained the exception to the first (5) and second libels (7) and dismissed them, unless they were amended, and, thereupon, the **two amendments** set forth at fols. 8 to 12 were made, the first in January, 1889, and the second in October, 1890, making **three amendments** permitted to libellants, while the **only and most meritorious one** of *res adjudicata* asked for by respondent, was denied (70, 239 to 266).

The Last (4th) Libel.

An analysis of the ground of the decision (2d Opinion, 230 to 234), shows that the reason why respondent has been held liable is because he collected **a part of his damages for the loss of the Andrew Johnson from the owners of the ship Thirlmere.**

The Thirlmere Recovery.

It seems as if the District Judge had entirely lost sight of the fact the libellants are not the bondholders.

The Real Question.

What is the legal remedy of the cargo-owner who has paid a bottomry-bond on his cargo, given for repairs to the ship?

First.—The giving the bond did no injury to the cargo-

owner; if the ship pays, the cargo-owner suffers no loss. As the bond is the *act* of the cargo-owner, through his agent by necessity, it does not bind the ship-owner personally. Does giving the bond on the cargo bind the ship to the cargo-owner? If it does bind the ship does the lien exist in favor of the cargo-owner *before* he has paid the bond?

Does payment of the bond by the cargo-owner *extinguish the lien* of the bond?

Is the cargo-owner subrogated to the lien of the bondholder by paying the bond?

The latter seems to be the most favorable position for the cargo-owner. Let us consider it.

The bondholder had a lien on the A. J. and on the cargo—in other words he had two funds to resort to.

> **Nota Bene.**—The respondent denies the validity of the bond as a lien on cargo, and contends that libellants paid it in their own wrong, but for the purpose of the argument, now assumes its validity.

The lien of the bond on the A. J. was a property interest in her which the Thirlmere destroyed. This gave the bondholder an Admiralty lien on the T. to the extent of the injury to his lien.

The Empusa, 5 P. D., 6.

The cargo-owner was substituted in the shoes of the bondholder by paying the bond, and had all the rights of the bondholder against the T., and came into the English Court of Admiralty and asserted those rights.

See Answer (63)—See Further Proofs.

The libellants say in their libel that the respondent collected "through appropriate legal proceedings" from the owners of the T., £6,557 on account of the loss of the A. J.

Why did that English Court adjudge that sum to the respondent in a proceeding in which libellants were contesting with him?

Was it not because they must have held the *bond* void as to cargo or *avoided* by the "*utter loss*" of the A. J?

But if libellants claim that respondent received that money for the use of libellants, wherein will that benefit them in an *Admiralty* Court under the allegations of their libel?

Appleton vs. Crowenshield, 3 Mass., 448, was an action at common law *on the bond*, and the capture of the defendant's vessel was held to avoid the bond.

Appleton vs. Crowenshield, 8 Mass., 358, was an action *on an implied assumpsit for money had and received* to the use of the plaintiff, to recover the amount of same bond on the ground that restitution of the vessel had been ordered on the reversal of the decree of condemnation as prize, and that by treaty defendant had received from Great Britain the value of the vessel.

Have libellants any other remedy?

If the libellants stand in the shoes of the bottomry bondholder, and had a lien on the Thirlmere, *they have their lien still*, unless it has been discharged by some act of theirs.

The respondent was in no sense the representative of the lien of the bondholder. There was no relation of bailor and bailee of that *lien*. The *owner* of the ship A. J. had no right to sue for an injury to the bondholders' lien, for the shipowner owed him no duty to enforce it, and no liability existed against the shipowner by contract or by implication for failure to hold the tort-feasor liable for the benefit of the bondholder.

The Bondholders' Lien on the Thirlmere.

By the law of bottomry the bondholder becomes the *owner* of an interest in the ship on which the bottomry bond is given. This is shown by the following authorities:

Smith vs. Williams, 2 Caine's Cases in Error, 109. Lancing, Chan., cited 2 Valin, 61; Emerigon 386, 396, and concluded (p. 124): "That the owner of a ship covered by a "bottomry bond to an amount *beyond her value* has not an in- "surable interest," and at p. 120 gives his reasons: "For the "value of the ship being covered by the bottomry, the obligee "cannot recover the money advanced on it (the ship being lost), "his right to ceasing with the destruction of the ship. * * * "To this intent, **the obligee in the bottomry bond "must, therefore, be considered as owner, for "he is to receive nothing unless the voyage "be made."**

Read vs. Mu. Ins. Co., 3 Sandford, 54, Oakley, *C. J.* (p. 63), followed Smith *vs.* Williams.

Watson vs. Ins. Co. of N. A., 3 Wash., C. C., 1; and **Williams vs. North China Ins. Co.,** L. R., 1 C. P. D., 770, are to the same effect.

The 5th Assignment of Error (fol. 280).

The limit of libellants' interest in the recovery had from the Thirlmere was their *pro rata* in the net amount.

Assume that libellants stand in the shoes of the bond-holder—and is suing the Thirlmere for the injury to the bond-holder's lien (property rights) in the Andrew Johnson and that the owner of the A. J. and the libellants, in their capacity of cargo owners, are also suing the Thirlmere, each for his claim for damages to his property rights in the A. J. and her cargo—what right has the bond holder to claim any **priority of lien** against the **Thirlmere.** His rights, **as against her,** arise out of a tort, which same tort injured the property of others at the same time, and without their fault? On what principle of law is the bond holder entitled to a *priority of lien* against the Thirlmere?

The *net* amount (*i. e.*, deducting respondent's expenses of the suit against the T.) is all that the libellants could share in, *assuming they have any rights as against respondent*, which is denied.

Sheppard *vs.* Taylor, 5 Peters, 717.

The Insurance Co. Owned One-half of the Andrew Johnson.

The proofs show that the A. J. was worth $60,000 (109), and was insured at that valuation (see policy of Boston M. I. Co., 108)—for $30,000—*i. e.*, Mr. O'Brien stood his own insurer for $30,000, and on the loss of the A. J. the Ins. Co. paid him on January 6, 1885 (before libellants paid the bond), $30,000 (116), and **thereby became half-owner** in the claim against the Thirlmere, and as such half-owner received from Mr.

O'Brien their share (½, less ½ expenses) of the sum received by him from the Thirlmere, viz., $11,456.08 on April 2, 1886, and $35.60 on June 28, 1886, *i. e., more than one year before libellants sued at all* (3) and more than four years before they *amended* their libel for the third time (10).

The Situation.

The Boston Marine Ins. Co. on January 6, 1885, paid Mr. O'Brien a total loss of one half of the ship A. J., and such payment made the Ins. Co. *owner* of that one half.

2 Phil. on Ins., p. 397 (5th ed.), § 1723: "A mere payment "of a loss whether partial or total gives the insurers an equitable "title to what may be afterwards recovered from other parties "account of the loss.

"The effect of the payment of a loss is equivalent, in this "respect, to that of an abandonment."

Adopted in Hall *vs.* R. R. Co., 13 Wall, 367.

§ 1711: "All claims against third parties on account of negli- "gence or agency occasioning the damage to the subject or "destruction of it by a peril insured against *are assigned to* "*the underwriter* by an abondonment, so far as the subject is "covered by the policy," and the author specifies the exact case in hand:

"As, a claim against the owners of another vessel for damage "by collision with the one insured."

Rogers vs. Hosack, 18 Wend., 319, C. of Errors, Cowen, *J.* (p. 331):

"All the authorities are that the assignment becomes absolute "from the time of the abandonment. It was not too strongly "put upon the argument. *The deed of a man's farm could* "*not operate more clearly to change the legal right.*"

Comegys vs. Vasse, 1 Peters, 193. Story, *J.* (214):

"The law gives to the effect of abandonment when accepted "all the effects which the most accurately drawn assignment "could accomplish."

The Potomac, 105 U. S., 630, Gray, *J.* (634): "But upon

" familiar principles, often recognized by this Court, *the insurer* " *acquires by such payment corresponding right in any dam-* " *ages to be recovered by the assured against the wrongdoer*, or " other party responsible for the loss."

Mobile, Etc., R. R. Co. vs. Jurey, 111 U. S., 584, Woods, *J.* (594) : " The payment of a total loss by the insurer " works an equitable assignment to him of the property, *and* " *all the remedies which the insured had against the carrier for* " *the recovery of its value.*"

The Remedies of the Ins. Co.

The insurer has the right to bring suit **in the name of the insured** for the injury.

It was so held in **The Monticello,** 17 How., 152, where the insured was paid his loss by the insurance company *before the libel was filed* (p. 424), and this law was followed in

Fritz *vs.* Bull, 12 How., 466.
Newall *vs.* Norton, 3 Wall, 257.

In **Gails vs. Hamilton,** 11 Penn. St., 515, cited and quoted from in Mobile, Etc., R.R. *vs.* Jurey (111 U. S., 594), the Court said : "A shipper who has received from the insurer **the** " **part** of the loss insured against, may sue the carrier " * * * *not only in his own right*, for the unpaid balance " due to himself, **but as trustee** for what has been paid by " the insurer."

When, therefore, it appeared that the respondent had paid over to the insurance company the part of the recovery from the Thirlmere, which belonged to it, it further appeared by *the law of the contract of insurance*, that the respondent never recovered that part for himself, and that *his name was used* by the insurance company for their one-half claim against the Thirlmere.

Yet on these facts the respondent, who was *only half owner*, and had collected only *half* the Thirlmere money *for his own account*, and had paid over to the Ins. Co. their half long before this suit was brought, has been held liable as if he had collected and kept it all (see Ans., fol. 63).

Is this ADMIRALTY justice?

INTEREST.

Respondent assigns as error the allowance of interest (3d Ass., 279).

Libellants sued for £1,617 4s 3d, worth $7,870.16 and interest from March 17, 1885 (34). The German lawyers, opinion is dated March 14, 1885 (155), and Wirtz testified (145) that libellants London agents wrote to him on March 16, 1885, that they were arranging to pay the bond. Richards, their London Average Adjuster, on May 31, 1886, stated their claim at £1,376/7/0.

The District Court (273) fixed the libellants' claim at $6,091.73 (*i. e.*, about £1,200) and allowed interest from April 2, 1886.

The libellants' claim (if they have any) was **unliquidated** until the decree of July 12, 1894, and the District Judge recognized thus when he said in his opinion (234): "The rules "of general average being somewhat different in this country "from those of England, if the parties are dissatisfied with the "adjustment made in London, a reference may be taken *to ascertain the proper amount* according to our law."

Smith *vs.* Velie, 60 N. Y., 111.
McMasters *vs.* State, 108 N. Y., 557.

The Admiralty Jurisdiction.

Respondent's third exception (58) raises the question whether the libel presents a case of **admiralty** jurisdiction.

It was not considered by the District Judge.

The Admiralty Rules of the Supreme Court have the force of law.

Bailey vs. Sundberg, 49 F. R., 585 (C. C. of Ap.), Wallace, *J.*: "The rule has the force of a law of Congress."

Rule 18 was promulgated Dec. Term, 1844 (3 How. vii) and superseded all prior decisions; among others, Sheppard *vs.* Taylor, 5 Peters, 707, decided in 1831, *if it conflicted.*

In **Snow vs. 180 Tons Iron,** 11 F. R., 517, the remedy to enforce a bottomry against *proceeds* is pointed out; and it must be read in connection with Rule 23 of the Admiralty Rules, which requires, "if the libel is *in rem*" (it shall state) "that "the property is WITHIN THE DISTRICT."

Of course the jurisdiction *in rem* depends upon possession of the *res* and the *allegation* of the libel must show the jurisdictional fact.

The reasons for so holding respondent liable assigned by Judge Brown are found at folio 231, and are hardly satisfactory, for the reason that no *personal* obligation of respondent *to pay the bond* ever existed and the present suit is *in personam*, **in admiralty.**

The libellants appreciated this defect in their libel and attempted to evade it, for at folio 21 they set forth their conception of their complaint as " in a cause of action civil and mari-
" time *of the kind and nature hereinafter more fully de-*
" *scribed.*"

Respondent had excepted to the 2d libel (6. See exception 14) on the ground that it does not state the nature of the said " action," and this exception was overruled (see order 18).

Respondent again excepted (57) to the 4th libel, specifying the same objection and indicating the 23d Admiralty Rule, as the one violated.

The **Ann C. Pratt** (1853), 1 Curtis C. C., 351, Curtis, *J.*: " In " my judgment, he who loans money on bottomry, **makes a** " **contract which is to be followed out through** " **all its remedies AS SUCH**; and when it proves to be " voidable for fraud, and is avoided, he cannot treat it as a " simple loan, secured by a maritime lien, *and thus charge it* " *on the property which he failed to obtain a right to* by the " only contract which was made.

" In accordance with this is the **18th** rule of Practice in the " Admiralty, prescribed by the Supreme Court: 'In all suits on " 'bottomry-bonds, properly so called, the suit shall be *in* " '*rem only* **against the property hypothecated,** " '**or the proceeds of the property,** in whosesoever " 'hands the same may be found, unless the master has, without " 'authority, given the bottomry bond; or by his fraud or " 'misconduct, has avoided the same, or has subtracted the " 'property, or *unless the owner has, by his own misconduct* " '*or wrong, lost or subtracted the property, in which latter* " '*case the suit may be* **in personam** *against the wrong-* " '*doer.*' "*

---

* I quote the *entire* rule.

"I apprehend that this points to the **only** remedy which the "lender has when the bond is void for the fraud of the master."

The above quoted rule defines the extent of *Admirally* jurisdiction to enforce the bottomry-bond.

It must be *in rem* against the property or proceeds except in the *one case specified*, where the owner may be sued *in personam.*

See the Corsair, 145 U. S., 335. No misconduct of the re-respondent is alleged, and the District Court had no jurisdiction **to enforce the bottomry-bond in personam.**

The Further Proofs.

On his appeal to this Court, the respondent claims the right to offer the stipulation of libellants, as to their appearance in the Thirlmere litigation, in evidence, and bases this right upon the following **laws,** and contends that Rule 7 of the Admiralty Rules of the U. S. Circuit Court of Appeals for the Second Circuit, so faras it is in conflict with those **laws,** is void.

Section 11 of Chapter 517 of the Acts of 1891 contains this paragraph:

"And all provisions of law **now in force** regulating the "*methods and system* of review through appeals or writs of "errors **shall regulate the methods and system** "of appeals and writs of error provided for in this Act **in** " **respect of the Circuit Court of Appeals."**

Nota Bene.—At the time that Act was passed, on an appeal from the **District** Court, the only system **" now in force,"** which regulated those appeals, was the system applicable to an appeal to the **Circuit** Court, for there was no appeal from the District Court in Admiralty, *in instance causes*, to the Supreme Court.

A Judge of the Circuit Court of Appeals with an Admiralty appeal from the *District* Court before him, and reading the statute above quoted, that "all provisions of law **now in** "**force** * * * **shall regulate** the methods and sys-"of appeals," who is desirous of applying that law to the case, would inform himself *what were the methods in force when that act was passed*, and having found that out, would say that he was bound to apply those methods, and would also say that he

had no right to apply any other methods or to *change* those methods or to *curtail* those methods, and his one duty would be satisfied when he had found out and applied those methods.

WHAT WERE THE METHODS IN FORCE?

In the **Charles Morgan**, 115 U. S., 75, the Supreme Court of the United States, said:

"In the Lucille, 19 Wall., 74, it was **decided**:

> **Nota Bene.** "**Decided**" means that it was conclusively adjudicated and with as much binding force as if a statute of the United States declared it.

"that an appeal in admiralty from the District Court to the "Circuit Court has the effect to supersede and vacate the de- "cree from which it was taken. **A new trial; complete- "ly and entirely new with other testimony** and "other pleadings if necessary, **or if asked for** is contem- "plated, a trial in which the judgment of the Court below is re- "garded as though it had never been rendered."

> **Nota Bene.** "*Completely and entirely new*" does not mean partially or in *some* degree, new, and there is no impropriety in saying that the foregoing decision of the Supreme Court is as binding on the Judges of this Court as on any other citizens of the United States.

The right is further secured by statutory enactments, as follows:

> U. S. Rev. Stat., § 862:
>
> "The mode of proof in causes of equity and of admiralty "and maritime jurisdiction **shall** be according to rules "**now** or hereafter prescribed by the Supreme Court." *

The rule of the Supreme Court "**now in force**" referred to in the Revised Statutes regulating admiralty was Rule 50 and it is *still* in force and is as follows:

> "When oral evidence shall be taken down by the clerk "of the District Court pursuant to the above mentioned "section of the Act of Congress"—
>
> **Note**: The act referred to is specified in Rule 49, as §30 of the Act of September 24th, 1789 (see 1st Statutes at Large, 89), which provided for the personal attendance of witnesses on the trial of all admiralty appeals in the Circuit Court; see the Samuel 1 Wheaton, 16,

" and shall be transmitted to the Circuit Court, the same " **may** be used in evidence on the appeal, **saving to** " **each party the right to take the deposi-** " **tions of the same witnesses**, or either of them, " *if he should so elect.*"

LASTLY.—Respondent has not waived his objection to the jurisdiction of the District Court by appealing to the Circuit Court of Appeals, rather than to the Supreme Court direct.

As pointed out in **United States vs. Jahn**, 155 U. S., 109, this Court, if it does not decide the case in respondent's favor on the merits, should certify the question of jurisdiction to the Supreme Court; and respondent hereby asks that it be done.

January 26, 1895.

Respectfully submitted.

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Advocate for Resp't,
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No. 266. 40.

Brief of Chubb for Appellant.

Filed Apr. 1, 1897.

Supreme Court of the United States.

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OCTOBER TERM, 1896,
No. 266.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MARLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants,

vs.

EDWARD E. O'BRIEN,
Respondent.

BRIEF FOR RESPONDENT.

SIDNEY CHUBB,
of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

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EDWARD E. O'BRIEN,
Respondent.

35 F. R., 779.
59 lb., 621.
67 lb., 605.

BRIEF FOR THE RESPONDENT.

Statement.

The case comes to this Court on *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit, which reversed a final decree of the District Court for the Southern District of New York in favor of the libellants *Miller et al.* (Gibbs & Co.), for $9,598.94.

On July 15, 1884, the American ship *Andrew Johnson*, belonging to the respondent Edward E. O'Brien, of Thomaston, Maine, sailed from Caleta Buena to Hamburg, having on board a full cargo of 19,943 bags of nitrate of soda owned by the libellants, Gibbs & Co., of Valparaiso, and consigned to their agents, Antony Gibbs & Sons, of London.

On August 4, 1884, the *Andrew Johnson* put into Callao, Peru, in distress, and was there repaired at considerable expense, and reladen with about three-fifths (11,494 bags) of her original cargo, the balance (8,449 bags) being, pursuant to surveyors' recommendations, laden on the British bark *Mary J. Leslie*.

To liquidate the expenses so incurred at the port of distress the master of the *Andrew Johnson*, Captain James H. Killeran, borrowed upon bottomry and respondentia from Grace Brothers & Co., of Callao, the sum of £2,212 5s. 9d., Stg., at a maritime interest or bottomry premium thereon of 17½ per cent., making an aggregate total of £2,599 8s. 9d. Sterling, for the payment of which he executed the bottomry and respondentia bond annexed to the libel as Exhibit A.

In September, 1884, the *Andrew Johnson* and the *Mary J. Leslie* left Callao for Hamburg, where the *Mary J. Leslie* arrived on February 5th, 1885. The *Andrew Johnson* and her cargo became a "total loss" (4th Libel, fol. 11) by collision with the British ship *Thirlmere*, in the South Atlantic, her captain and the survivors of the crew being landed at Pernambuco by the *Thirlmere*.

Upon the *Mary J. Leslie's* arrival at Hamburg, Messrs. Baring Brothers & Co., of London, acting on behalf of the holders of the bottomry and respondentia bond, claimed its payment, and the consignees of the cargo, Messrs Antony Gibbs & Sons, doubting their obligation to pay this claim, obtained from Messrs. Baring Brothers & Co., on February 11, 1885, the release of the cargo in consideration of their (Gibbs) written undertaking to pay whatever proportion of the said bond may be found to be legally due from the cargo by experts appointed by each of said firms.

On March 14, 1885, the said experts, Dr. Stammann and Dr. Wolffson, lawyers of Hamburg, rendered their decision to the effect that the cargo landed from the *Mary J. Leslie* was liable for the

whole amount of the bond notwithstanding the sinking of the *Andrew Johnson* and her cargo, upon the ground that the contrary conclusion "is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand."

Upon receipt of the arbitrator's award, the libellants' agents, on March 17, 1885, paid Messrs. Baring Brothers & Co. the full amount of the bond including the maritime premium of 17½ per cent., amounting to £2,592 7s. 9d.

During the year 1885 (fols. 85, 97) James Fisher and others, owners of the *Thirlmere*, instituted proceedings in the English High Court of Justice, Admiralty Division, against both parties to this action and against others to limit their liability for damages growing out of the said collision between the *Andrew Johnson* and the *Thirlmere*, and paid into said court the sum representing the statutory limit of their liability amounting to £13,685 7s. 2d. (fol. 85), which sum was afterwards and prior to April 2, 1888 (fol. 39), divided between the parties to this action and the master, officers and crew of the *Andrew Johnson*, the aggregate of whose allowed claim exceeded the fund in court by more than £4,000 (fols. 87, 45).

More than a year after the distribution of the *Thirlmere* dividend, and on July 20, 1887, the first libel herein was filed. This libel alleges that the *Andrew Johnson* and her freight had become a "total loss," and made no mention of the *Thirlmere* dividend. On August 4, 1887, the respondent filed exceptions to the first libel in that (1) it did not state the nature of the action (as required by the rules), and (2) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the Hon. Addison Brown, Judge of said District Court, on the 10th day of April, 1888, who rendered his

decision on the 6th day of June, 1888, and on the 27th day of June, 1888, an order was duly made and entered overruling the first and sustaining the second of said exceptions, and ordering that, unless said libel be amended, the respondent have a final decree against the libellants dismissing their libel, with costs. On July 28, 1888, libellants filed an amended libel (No. 2), the amendment consisting in the addition to the fourth article of the libel of the allegation that the condition and character of the ship *Andrew Johnson* was such that she could not by repairs be made fit to carry her cargo to the port of destination, nor be fitted to carry any portion thereof forward except by making heavy repairs; the transshipment of 8,449 bags of cargo on the *Mary J. Leslie*, and that in place of transshipping the remaining portion of said cargo to other bottoms and forwarding the same to its destination, which would have been the proper course to pursue, the respondent, for his own advantage, and not for the advantage of the libellants, elected to carry forward the said remainder of the cargo, and to that end discharged and warehoused a large portion of said cargo and made extensive repairs to the ship.

And further, in alleging in the sixth article the issue by the *Mary J. Leslie* of her bill of lading, a copy of which was annexed to such amended libel.

On September 27, 1888, respondent filed exceptions to said amended libel in that (1) it did not state the nature of the action; (2) that it did not state a cause of action against the respondent by reason of the absence of any averment of the performance of a condition precedent to the validity of any bottomry and respondentia to wit, *communication had by the Master before execution thereof with the respective owners of the cargo;* and (3) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the said District Judge on the 28th day of November, 1888, and on the 5th day of December, 1888, an order was made and entered overruling the first and sec-

ond of said exceptions and sustaining the third exception, and ordering that unless the libel be further amended that the respondent have a final decree against the libellants, dismissing the libel, with costs.

On January 4, 1889, libellants filed a second amended libel (No. 3), the amendment consisting in the addition to the fifth article of an allegation that the respondent supplied funds to the Master or caused funds to be supplied by Grace Brothers & Co., of Lima, Peru, to defray the expenses of repairs, &c., and an allegation that the libellants, not being fully advised of the circumstances, and believing that the bond was properly and necessarily issued, assented; an amendment of the sixth article alleging that the libellants believed that they were in law bound to make payment of the bond to redeem their cargo; and the addition to the seventh article of an allegation that the ship *Andrew Johnson* was of the value exceeding $15,000 at the time in question. On January 28, 1889, respondent filed exceptions to said libel in that (1) it did not state the nature of said action; (2) that it was ambiguous and uncertain in averring in article 5th that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., and thereafter averring that Grace Brothers & Co. advanced said sum to the master; (3) that it did not state a cause of action within the admiralty and maritime jurisdiction of the Court against respondent, and (4) that it did not state a cause of action against respondent.

On October 24, 1890, on motion of libellants and after argument by counsel, an order was made allowing the libellants to further amend their libel by adding to the sixth article thereof the following: "The said loss of the said ship *Andrew Johnson* "and her cargo on the said voyage from Callao to "Hamburg was due to her collision with the British "ship *Thirlmere*, and it appearing that said colli- "sion was due solely to the fault of those navigat-

"ing the said ship *Thirlmere*, the respondent or his "privies have, through appropriate legal proceed- "ings in the courts of Great Britain, compelled the "owners of the said ship *Thirlmere* to pay on ac- "count of the loss of the said ship *Andrew Johnson* "and her freight the sum of £6,557 9s. 6d. and "have collected and received the same," and on October 28, 1890, libellants filed their amended libel (No. 4), in conformity with said order.

On June 22, 1891, respondent filed his exceptions and answer to said amended libel (No. 4).

The said exceptions were:

(1.) That the said libel (No. 4) did not state the nature of the action as required by the twenty-third Admiralty Rule.

(2.) That it did not state a cause of action against this respondent.

(3.) That it did not state any cause of admiralty and maritime jurisdiction.

Without waiving the benefit of the foregoing exceptions the answer proceeded to admit some of the allegations of the fourth libel and to deny others.

The libel (No. 4) and the exceptions and answer of the respondent thereto appear at pages 4 to 14 of the Transcript of Record.

The cause came on to be heard before the Honorable *Addison Brown*, District Judge, on November 22, 1893, whereupon after hearing the pleadings read the Court overruled the first and third exceptions and reserved the consideration of the second until the evidence should be taken.

The advocate for the respondent thereupon moved to amend the answer by setting up two separate and additional defenses; first, to as much of the libellants' claim as arises out of the limited liability proceedings in the English Court as to the *Thirlmere*; the defense of laches on the part of the defendant in not sooner bringing that matter before the Court;

also, second, as to the same portion of the claim the defence of *res adjudicata* because passed on by the English Court.

The Court denied each of said motions and the second on the ground of want of notice to the libellants, and the respondent having duly excepted the taking of the evidence was begun, the libellants reading in evidence the depositions of ten witnesses and the respondent that of one witness and the cause was then argued by counsel, no witnesses having testified in open court.

On February 5, 1894, the District Judge rendered his decision in favor of the libellants (printed at p. 45).

Subsequently the respondent again moved upon affidavits for leave to set up the said two additional defenses, which motion came on to be heard on April 10, 1894, and was denied, and an order to that effect entered on April 19, 1894 (Record, pp. 49 to 54).

Upon the coming in and confirmation of the Commissioners' report a final decree in favor of the libellants Gibbs & Co. was entered on July 12, 1894, for $6,091.73, with interest thereon from April 2, 1886, and taxed costs, amounting in all to the sum of $9,598.94.

The respondent appealed to the United States Circuit Court of Appeals for the Second Circuit from this final decree, and the Court, held by *Wallace*, *Lacombe* and *Shipman*, *JJ.*, having heard argument by counsel, handed down, by LACOMBE, *J.*, its opinion reversing the said final decree, with costs to the respondent O'Brien in both courts (Record, pp. 58–65).

On May 6th said Circuit Court of Appeals entered its decree directing a mandate to issue to the District Court to enter a decree in conformity with its decision.

On May 7th a writ of *certiorari* was obtained herein by the libellants from the Supreme Court, and on May 8th the Circuit Court of Appeals made an order staying the issuance of a mandate under its

decree of May 6th pending the determination of the cause in the Supreme Court of the United States.

As the matter reviewed in this Court upon a writ of *certiorari* is the *decree* of the Court below, it is competent for a party to argue that such decree was correct, not only for the reasons set forth in the written decision of the Court below, but also for any other independent reasons which lead to the same result.

Such argument being competent, the sweeping terms of the mandate of this Court, after it decides a case, render it expedient to state the whole of our argument in this brief, although in our view the opinion written by Judge *Lacombe* correctly disposes of the controversy.

Point I.

The foundering of the *Andrew Johnson* with her cargo rendered the bond void.

The bond was executed in triplicate "*after careful reading*" by the master, Killeran, in the presence of two witnesses, H. G. Lester and H. M. Bromley, and of the United States Consul, H. M. Brent, and was acknowledged before the latter. It is no brief and informal draft or memorandum, but a carefully drawn document of over one thousand words, using words of limitation and other technical terms in their proper places with such precision and accuracy as to compel the conviction that it was drawn by a lawyer. Omitting a few immaterial words and claims it reads as follows:

> "Know all men by these presents that I,
> "James H. Killeran, master mariner and
> "commander of the ship *Andrew Johnson* of
> "Thomaston, Maine, of the measurement,

" &c.; now lying in the port of Callao, am held " and firmly bound to Messrs. Grace Bros. & " Co.; of &c.; in the penal sum of * * * " £2,212 to be paid to the said Grace Bros. & " Co., or any of them, &c.

" For which payment to be well and faith- " fully made, I bind myself, my heirs, &c., " and also the hull, boats, tackle, apparel and " furniture of the said vessel, and her cargo " of nitrate of soda, including about 1,200 of " nitrate of soda transshipped on board the " British bark *Mary J. Leslie* of &c., and " the freight to be earned and become pay- " able in respect thereof, firmly by these pres- " ents.

" Sealed, &c.

" Dated, &c.

" Whereas, the said vessel lately sailed, " &c. * * * sprang a leak * * * bore " up to Callao * * * was duly surveyed, " * * * and certain repairs were recom- " mended to be done to enable the said vessel " to continue the voyage with safety, and also " to tranship to another vessel about 1,200 " tons of the cargo laden on board the afore- " said *Andrew Johnson* in order to enable her " to proceed on her voyage with perfect " safety.

" And, whereas, all necessary repairs and " supplies have been made to the said vessel " and the said portion of cargo transshipped to " the *Mary J. Leslie* to enable her to prose- " cute her said voyage, and she is now in a " seaworthy condition and ready to proceed to " sea, but the said James H. Killeran having " unavoidably incurred certain debts for such " repairs and other necessary and lawful mat- " ters and things relating to his said vessel " which he is totally unable to defray and " make good save and except upon the security " of the bottom of his said vessel and her cargo

" and freight, hath been necessitated to raise " the sum of * * * £2,212 for the pay- " ment of the debts incurred as aforesaid and " to enable the said vessel to proceed to sea on " the said intended voyage and which sum " the said master has been unable to obtain on " his own credit or that of the owners of the " said vessel or in any other way than by bot- " tomry and hypothecation of the said ves- " sel, her boats, apparel, cargo and freight;

" And whereas, the said Grace Bros. & Co., " have, at the request of the above bounden " James H. Killeran, agreed to lend and ad- " vance to him the sum of * * * £2,212 " * * * for the purpose aforesaid upon his " executing this present bond or obligation " and hypothecation of the said vessel, " her boats and apparel, and her cargo, in- " cluding that portion of her cargo trans- " shipped to the *Mary J. Leslie* and the " freight to be earned and become payable in " respect of the said voyage, and the said " Grace Bros. & Co., are contented to stand " to and bear the risk, hazard and adventure " thereof, upon the hull, body or keel of the " said vessel *Andrew Johnson*, her boats, " tackle, apparel and furniture, together with " the cargo laden on board as aforesaid, and " the freight to be earned and become pay- " able as aforesaid, and for securing the re- " payment of the said sum * * * the loan " whereof is hereby acknowledged, he the " said James H. Killeran, doth by these pres- " ents mortgage, hypothecate and charge the " said vessel, her boats, tackle, apparel and " furniture and her cargo, including that por- " tion of the cargo transshipped to the *Mary* " *J. Leslie* and the freight to be earned and " become payable in respect of the said voy- " age, unto the said Grace Bros. & Co., their " executors, &c.

"Now the condition of this obligation is
" such that if the said vessel shall forthwith
" set sail from Calloa aforesaid, and without
" unnecessary delay or deviation proceed on
" her intended voyage to Hamburg, and if
" the above bounden James H. Killeran shall
" and do within the space of five days next
" after the arrival of the vessel at her final
" port of destination, and before commenc-
" ing to discharge the cargo free of any aver-
" age whatever at the then current rate of
" exchange on London, well and truly pay or
" cause to be paid unto the said Grace Bros.
" & Co , &c., upon the present obligation the
" sum of £2,212, &c., being the principal
" money of this obligation and the further
" sum of £387 for the maritime interests or
" bottomry premium thereon at the rate of
" seventeen pounds, ten per centum, making
" together £2,599, &c., &c.

"Or, if during said voyage an *utter loss of*
" *the said vessel* by fire, enemies, pirates, the
" perils of the sea or navigation or any other
" casualty, shall unavoidably happen,&c.,&c.,
" then, and in either of the said cases, this
" obligation shall be void, or otherwise to be
" and remain in full force and virtue."

It will be observed that this elaborate and carefully worded document sets forth all the essential circumstances under which the contract was made between Grace Bros. & Co. and the master, as fully as the record in this case does. The disaster, the seeking a port of refuge, the survey, the repairs to the ship, the handling of the cargo, and the necessity of lightening the *Andrew Johnson* to enable her to complete her voyage, the transshipment of about 1,200 tons of cargo to the *Mary J. Leslie*, the inability of the master to raise the money to pay expenses—all these are fully disclosed by the instrument itself, and the other evidence in the case adds nothing to our in-

formation as to the situation existing when the bargain was made. The bond is clearly expressed and free from any ambiguity. The words "said vessel," whenever they are used, from the beginning to the end of the bond, refer grammatically and logically to the *Andrew Johnson* and to her only.

The libellants concede that unless they were *obligated* to pay the bond upon the arrival of their cargo *ex Mary J. Leslie* at Hamburg they have no claim against us.

They contend that this obligation is arrived at by each of two independent lines of reasoning:

(1.) That the bond was payable unless there was an "*utter loss*" of *both* vessels and their cargoes; and that, therefore, as the transshipped cargo did arrive and was, in effect, "salvage" from the *Andrew Johnson*, it was liable for the face of the bond.

(2.) That there was not an "*utter loss*" of *either* of the two vessels or their cargoes, since one of the vessels, with her cargo, arrived *in specie*, while the other vessel was not an "*utter loss*," because upon her foundering a cause of action arose against the *Thirlmere* upon which the respondent collected a dividend (upon his proving to the High Court of Justice in England that before bringing his action *he had sustained an* "*utter loss*" of his vessel and her freight by the collision).

Before considering these two arguments or theories of the case, we write to point out *in limine* that in presenting them the libellants occupy inconsistent positions.

Under their first theory they claim that the question is to be determined according to the law of the place of final performance of the bottomry contract, and they have therefore attempted to prove as a fact, by expert witnesses, the law prevailing at Hamburg.

In taking such proof the libellants were at least logical and it might be that *if* the case in all its

parts is to be governed by the law of the port of destination and *if* all the material facts were submitted to the experts and *if* in arriving at their opinion they considered only the material facts so submitted and refrained from considering matters *dehors* the record, the conclusion to be drawn from such evidence would favor the libellants unless this Court should be with us upon the plea of *res adjudicata* because of the prior passing upon the libellants' claims by the English Court.

In urging their second theory, however, the libellants make no mention of the Hamburg law.

We submit that if the meaning of the defeasance clause, which is set forth in their first theory, is to be decided by German law, the meaning of the same words which is set forth in their second theory is equally to be decided by German law, and since no questions to that end were propounded by the libellants to their experts, although they were examined subsequently to the collection of the *Thirlmere* dividend, the natural inference is that such questions were not propounded because the libellants' counsel knew that the answers would be unfavorable to his clients; hence it results, in our judgment, that the libellants having in their brief urged their first theory, cannot in this state of the record herein *also* urge their second theory.

In considering the libellant's first theory it is proper to draw the Court's attention to the circumstances surrounding the Hamburg arbitration and to the testimony of the two Hamburg lawyers adduced in support of this theory.

As the bondholders' agents claimed its payment and the cargo owners' agents doubted its validity (fol. 40), it was agreed between them that the cargo should be instantly released and the question of liability should be decided by two Hamburg lawyers, one to be named by each side. This was done, and the lawyers named were Dr. Stammann and Dr. Wolffson. The testimony is very meager as to the manner in which the submission was made.

Dr. Wolffson testified (fol. 51):

"I *presume* that the bond annexed was "submitted to me at the time and that the "fact of the loss of the *Andrew Johnson* was "made known to me. I presume that I "must also at the time have seen the annexed "bill of lading (same is annexed to amended "libel)."

Dr. Stammann testified (fol. 54) that the bottomry bond was submitted and the arbitration given as requested:

"I do not remember whether the *loss* of "the *Andrew Johnson* was made known to "me *as this was not relevant to the contents* "*of our judgment.* I do not remember "whether I have ever seen the annexed bil? "of lading (same is annexed to amended "libel), not having been necessary for the "giving of the opinion or judgment."

No other facts are testified to as to the manner of submission. Two other lawyers, former partners of the libellants' arbitrator, Dr. Stammann, testified that they agreed with the arbitrators' decision, which was as follows:

HAMBURG, 14th March, 1885.

"HUGO WIRTZ, Esq.,
"Messrs. I. Berenberg, Gossler & Co.

"We formulate the question which you, "in the names of Messrs. Antony Gibbs & "Sons and Messrs. Baring Brothers & Co., "have submitted to our judgment, as "follows:

"Whether the portion of the cargo of "nitrate of soda of the *Andrew Johnson* "brought home per *Mary J. Leslie*, is liable "for the whole amount of the bottomry "bond, which was signed in Callao, and "whether, consequently, the receiver of this "portion of the cargo has to pay the whole

" of the bottomry bond, provided the value of " this portion of the cargo is not less than " the amount of the bottomry debt?

" This question we must answer in the " affirmative, because according to the law " here, ship, freight and cargo of the *Andrew* " *Johnson*, as well as the portion of the cargo " which was transshipped into the *Mary J.* " *Leslie*, are jointly liable for the whole " amount raised on bottomry at Callao, and, " therefore, the *Andrew Johnson* and her " cargo having become a total loss, the holder " of the bottomry bond can come upon that " portion of the cargo which was shipped by " the *Mary J. Leslie* for the whole amount " of his claim.

" Some doubt might be raised as to " whether, according to the wording of the " bottomry bond, the money was not lent or " appeared to be lent contingent upon the " safety of the *Andrew Johnson*, and becom- " ing due only after her arrival at her port " of destination, but becoming null and void " in the event of her non-arrival. We are of " opinion, however, that this interpretation is " not consistent with the real intention of " the contracting parties, and that the word- " ing referred to has originated in the not " sufficiently careful use and employment of " a form of bond which happened to be at " hand. This seems the less doubtful to us for " this reason, that if the bottomry bond were " interpreted in this manner, the cargo of the " *Mary J. Leslie* would be entirely liberated, " after the loss of the *Andrew Johnson* " occurred, and would not even bear a por- " tion of the bottomry debt, which neverthe- " less has arisen out of a case of general " average. Manifestly this cannot have been " the intention of the parties interested.

" Yours truly,

" (Signed) L. OTTO STAMMANN.

" I. WOLFFSON."

The foundation of the libellants' claim is, they contend, that in order to obtain their cargo they had to take up the bottomry bond. There were no court proceedings, and, as we were not parties to the arbitration, it can not, of course, be binding upon us. The utmost effect therefore that the libellants can claim for the Hamburg evidence is that it proves that *if* there had been a suit at Hamburg the bond would have been unheld.

To this we have several complete answers:

(1) Material facts which would have compelled a contrary concluson were not stated to the German lawyers.

Article 504 of the German Code obliges the master "to take every possible care that those interested in "the cargo are speedily informed of such occurrence "and of the measures thereby rendered necessary" (fol. 63).

The fifth article of the fourth and final libel shows that the master of the *Andrew Johnson* failed to perform this obligation, and yet the arbitrators were not informed of this. Had they been so informed they must have held the bond void.

(2) One of the arbitrators testified (fol. 51) that analogous cases were not known to him and all the experts agreed that "in my opinion no law prevail-"ing at Hamburg prohibits parties to a bottomry "and respondentia bond from making an agreement "that if the vessel hypothecated by it be lost by a "peril of the sea, the bond shall thereby become "null and void."

The Court below held that such an agreement was made by us and that the bond was void.

Both of these answers to the libellants' contention could have been made, even though the arbitrators had followed the advice given by a great jurist to judges of inferior jurisdiction, to state their conclusions but never their reasons, and had closed

their decision at the words "This question we must answer in the affirmative."

They went further, however, and showed that they based their conclusion upon their assumption, not upon the point now urged by the libellants, that the *Leslie's* cargo was "salvage," but that the "wording" of the contract did not express the intention of the parties to it, but arose from "the not "sufficiently careful use and employment of a form "of bond which happened to be at hand."

To the refutation of this gratuitous assumption concerning the intention of the parties made by Judge *Lacombe* in his opinion (pp. 63 and 4), we need only add that this award is proved to have been sent to the libellants or to their agents upwards of eight years before the trial in the District Court, so that they had ample time in which to investigate the suggestion of a scrivenor's error, and to introduce the necessary pleadings and proof had it been founded upon fact.

Having based their decision upon an assumption utterly without foundation, the arbitrators attempt to support it by an additional argument in these words:

> "This seems the less doubtful to us for this "reason, that if the bottomry bond were in- "terpreted in this manner, the cargo of the "*Mary J. Leslie* would be entirely liberated "after the loss of the *Andrew Johnson* oc- "curred, and would not even bear a portion "of the bottomry debt which nevertheless "has arisen out of a case of general average. "Manifestly this cannot been the intention "of the parties interested."

This involves the ridiculous assumption that one of the parties to a contract has not intended to make a stipulation which it is manifestly to his interest to

make, and for the granting of which the opposing party has an opportunity to compensate himself (and which it must conclusively be presumed that he has from the terms of the instrument itself) in fixing the rate of premium which he is to receive for agreeing to such stipulation.

It was for the master's interest to obtain a stipulation that the bond should fail if the vessel should sink, since the vessel and freight are the primary and the cargo the secondary liabilities under the bond, it was also his duty to make, if he could, as good a bargain for his cargo as he did for his vessel, and the master having carved out the risk which he wished the lender to assume, the latter fixed the premium in accordance with his risk.

The libellants realizing no doubt that there is a failure of proof as to their claim that they were *compelled* to pay the bond, seek to "mend their hold" and contend that upon a proper construction of the bond according to our law they have a cause of action against us for the various reasons urged in their brief.

We submit that they cannot thus mend their hold but must stand or fall upon the proof as to the German law.

Leaving this objection for consideration by the Court we proceed to state our reasons for contending that in any event the libellants' arguments are unsound.

The libellants claim that the defeasance clause should be interpreted as if it read "or if during said voyage an utter loss of *both of said vessels* * * * should unavoidably happen."

See their brief on application for *certiorari*, page 10, "for the words 'said vessel' in the defeasance "clause relate clumsily perhaps, but clearly, to either "the *Andrew Johnson* or the *Mary J. Leslie*."

Since the words of the defeasance clause are plain and unambiguous of themselves and since it is a cardinal rule that construction cannot begin until and unless there is some ambiguity in the instrument itself, the libellants are compelled to seek such alleged ambiguity in other parts of the bond in order to provide themselves with a starting point for their interpretation.

> "Indeed, the very idea and purpose of con-
> "struction imply a previous uncertainty as to
> "the meaning of the contract; for where this
> "is clear and unambiguous there is no room
> "for construction and nothing for construc-
> "tion to do. A court would not, by con-
> "struction of a contract, defeat the express
> "stipulations of the parties."
>
> *2 Parsons on Contracts* (8th Ed.), *617*.
> See also *Dumont* v. *U. S.*, *98 U. S.*, *142*.

Their contention is that the words "the said vessel" earlier in the defeasance clause must relate to both vessels, because it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamberg earlier than the *Andrew Johnson*, she should lie in Hamburg before commencing to discharge cargo.

This is pure surmise. Parties to a maritime contract are not bound to discuss in it all possible incidents and outcomes of the effects of the wind and waives under penalty of having plain terms treated as ambiguous.

They may not have considered this contingency at all. On the other hand they may have considered it practically certain on such a voyage so large a vessel as the *Andrew Johnson* would have arrived earlier than a small one like the *Mary J. Leslie* if she arrived at all, and may therefore have thought it unnecessary to stipulate further on this point.

Of course, if the parties to the bond intended

"said vessel" where first used in the defeasance clause to mean "both of said vessels," they may also have intended it to mean the same where last used in said clause, but of this there is not a scintilla of proof.

The libellant's contention on this head in reality consists of two propositions:

(1.) That the defeasance clause is ambiguous.

(2.) That such ambiguity must upon consideration of the whole instrument be solved in the sense contended for by them.

We submit, however, that even if the defeasance clause were ambiguous, other portions of the bond furnish a conclusive negative to the second proposition.

Upon examination of the bond it will be seen that wherever the *extent* of the lender's security is mentioned the *Mary J. Leslie's* cargo is *expressly* included by means of the words cargo "*transshipped*," but that wherever the *risk* which the lender is to run is mentioned the *Leslie's* cargo is not named at all.

The two places in a respondentia bond where by custom the *risk* is defined, are that portion of the recitals which relates to the lender, and the condition or defeasance clause.

The latter, we contend, even when taken by itself, refers only to the *Andrew Johnson*, but if there be room for doubt on the point such doubt is removed when we find in the recital clause which deals with Grace & Company, the lenders, that "the said Grace "Brothers & Co. are contented to stand to and bear "the risk, hazard and adventure thereof upon the "hull, body or keel of the said vessel *Andrew John-*"*son*, her boats, tackle, apparel and furniture, to-"gether with the cargo laden on board as aforesaid "and the freight to be earned and become payable "as aforesaid."

In this connection we read in the libellants' brief (p. 11) in support of their application for *certiorari:*

> " It is significant that since the (District) " Court so interpreted the bond, both the " master and the owner of the *Andrew John-* " *son* have been called as witnesses and " neither of them has suggested that there " was any intention to make the bond depend " upon the arrival of the *Andrew Johnson* at " Hamburg."

A witness's function is simply to answer truly such questions as are put to him by the counsel for the respective parties. As we do not now, and did not then, believe such testimony to be relevant, competent nor material, we could not properly nor consistently cross-examine as to it. As the libellants' counsel seems to think otherwise and as he called both the witnesses he names, and being the plaintiff the *onus probandi* was on him, why did he not ask the appropriate questions?

The reasonable and customary inference is that he refrained from so doing because the answers thereto would have told against his clients.

The libellants' second contention is that only by upholding the bond can due effect be given to the intention of the parties, which was that whatever got to Hamburg should be held to pay the bond.

This again is not only mere surmise and conjecture as to the parties' intention but is a surmise against the natural possibilities and probabilities of the case.

Their argument is that because the *Mary J. Leslie's* cargo is named in the bond and because the security without her cargo was ample, the naming of her cargo shows an intention to make it liable although the *Andrew Johnson* were lost.

This leaves out of account however the effect of the perils of the seas which is the excuse or cause of the bottomry premium.

The ship and freight money are the primary liabilities in cases of bottomry and the cargo merely a secondary liability. If there were no exposure to perils of the seas the ship alone ($60,000) or the freight money alone ($20,000) were each more than sufficient to satisfy the bond without joining the cargo; the only object therefore of covering any part of the cargo must have been to make good a possible deficiency caused by sea perils reducing the value of ship and freight below the face of the bond; if, however, such sea perils were encountered as to reduce the ship and freight of the *Andrew Johnson* from $80,000 to less than $8,000, it is absolutely certain that the same sea perils would also affect her cargo enormously (since otherwise the freight due from it would itself discharge the bond twice over), and it therefore was prudent to include the *Mary J. Leslie* cargo as additional secondary security to make good any possible deficiency of the other. A natural and reasonable explanation of the naming of the *Leslie's* cargo in the bond being thus given and such course being in accordance with the custom, which is to include all a vessel's cargo or none in such bonds, there is no excuse or cause for drawing the inference claimed by the libellants.

Moreover, the libellants' inferences are strongly negatived by the inferences to be drawn from the maritime premium exacted.

Seventeen and one-half per cent. bottomry premium (which is virtually insurance against total loss only of both ship and cargo for the voyage), although a high rate on even a single vessel, is not unprecedented; such a rate, however, on total loss of both of two vessels or, what is the same thing, of cargo by both of two vessels, is so unheard of and extortionate, that an intention to pay it could only be credited upon the direct testimony of trustworthy witnesses, and cannot otherwise be inferred as the deliberate intention of any one possessed of ordinary business capacity.

The libellants discuss at great length the question of "*salvage*" in bottomry cases under the laws of various countries, but it seems to us that such discussion is irrelevant here, since the citations show at most the incidents annexed to a contract of bottomry by the codes and courts of the various countries in cases where the contract itself expressly reserves or is silent as to salvage, and they cannot, therefore, control in the case at bar where there is not only no reservation of salvage or average, but words are used expressly negativing such reservation, and where in addition there is an unusual state of facts and a peculiarly precise defeasance clause.

In other words, the European cases, like that of *Insurance Company* v. *Gossler* in this Court, discuss the incidents of a bottomry bond, "*unless the condition is otherwise.*"

It is also to be borne in mind that the Hamburg experts testified that analogous cases to the one at bar were not known to them, and also that there was nothing in the law of Germany to "prohibit "parties to a bottomry and respondentia bond "from making an agreement that if the vessel hy- "pothecated by it be lost by a peril of the sea, the "bond shall thereby become wholly null and void" (Record, fol. 55).

The libellants further argue that the *Andrew Johnson* did not become an "*utter loss*" when she went to the bottom of the sea because her going to the bottom gave her owner a chose in action against the *Thirlmere;* or as the learned counsel put it upon the trial in the district court the "chose in action is the same as the ship."

Here, again, the libellants seek to wrest the words used by the parties from their customary meaning so as to make them appear to cover their claims.

There is no rule of construction better settled than that which holds that, where words have by force of

custom in any particular business come to have a fixed and definite meaning, they shall be given such meaning in contracts appertaining to such business unless a different meaning is compelled by the context.

From time immemorial the precise collocation of words used in this bond has been employed in all bottomry contracts, and has been understood to mean the physical loss of the vessel pledged. The survival of the cause of action after the foundering of ship and cargo is a metaphysical and legal conception in which master mariners and bottomry lenders are not accustomed to deal.

> "So if parties used in a contract technical "words of the law merchant, such as aver- "age, or agio, or grace, these words could "not be wrested from their customary and "established meaning, on the ground that "the parties used them in a sense which had "never before been given to them."
>
> *2 Parsons on Contracts, 614.*

The learned counsel for the libellants had cited no case in which "utter loss" is held to mean anything but the physical loss of the vessel, even when the bond included salvage and average accustomed, which was carefully omitted in this bond and cannot now be read into it without making for the parties a contract which they declined to make.

In the words of Judge *Lacombe:*

> "But the hazard taken by the bottomry "bondholder is the physical removal of the "ship, or at most of any salvage from her. "When she goes to the bottom with all she "holds, there is an utter loss within the "meaning of the contract of bottomry and "the bond goes down with the vessel" (fol. 108).

The libellants also argue that:

The true meaning of the defeasance clause is that, in the event of the property being damaged or in part destroyed by sea perils, the bondholder's rights are limited to the value of such property as may be saved, and that he has no remedy against the master or owner of the vessel personally for the stipulated amount of the bond, a right which he would have if the property had been destroyed or diverted by the deliberate intention of the master or owner (the *Catherine*, 15 Jurist, 231, 232, Libellant's Brief, p. 15).

We submit that this construction makes the clause a mere waste of words, since it simply states the rights the parties would have had in the absence of any express stipulation under the law of the forum and under the law of the flag, and also presumptively under the laws of the place of contract and of the place of final performance.

We have been able to discover, after a somewhat extended search, but two reported cases in which the facts were sufficiently like those of the case at bar to be in the least in point—neither of them is controlling in this Court as authority, and we think we can also show that neither is persuasive as argument.

The first is the case of *The Empusa*, 5 Prob.Div.,6.

The master of the *Commerce* obtained from the agent of the *Cassa Marittima* at her port of loading a loan for which he executed the following instrument:

> " Fifteen days after arrival at the Port of
> " Antwerp or other intermediate port at which
> " shall end the voyage of my vessel denomin-
> " ated the *Commerce*, I promise to pay to the
> " order of the *Cassa Marittima* of Genoa, the
> " sum of £598 1s. 4d., value received as loan
> " on freight for the last expenses necessary to
> " the undertaking of the voyage from Phila-

"delphia to Antwerp, Belgium, on the condi-
" tions of the regulations of the *Cassa Marit-*
" *tima*, of which I have received a copy, ship
" and freight being, in accordance with such
" regulations, liable for repayment, with
" priority over every other credit."

The sum of £598 1s. 4d., was made up of the amount loaned and the premium and interest thereon.

The *Commerce* was sunk by the *Empusa* in deep water, and became, with her cargo, a total loss, whereupon the owners of the *Empusa* paid into Court £8,940 13s. 8d., their statutory limit of liability for loss of property. The claim of the owners of the *Commerce* for loss of freight was allowed at £2,088, and the *Cassa Marittima* claimed to prove against the fund in court for the sum of £598, 1s. 4d., or else to have an order that the owners of the *Commerce* pay said sum out of their award, or that they recover their *pro rata* share of the sum apportioned in respect to the loss of freight, either from the sum in court or from the owners of the *Commerce*.

The learned Judge is reported as having said on the argument that the transaction was a loan on bottomry, but his actual decision was as follows:

Sir Robert Phillimore: "This is a case for
" which there is no legal precedent, but it is
" one that is to be decided on general prin-
" ciples of equity, and I decide that the *Cassa*
" *Marittima* is entitled to receive out of the
" fund in Court applicable to the payment of
" damages for the loss of freight, the same
" proportion of the £598, 1s. 4d., as the total
" sum apportioned in respect of the loss of
" freight bears to the whole freight of the
" ship. The actual apportionment will be
" made by the register." Which was done, and the *Cassa Marittima* recovered £181, 6s. 7d.

We are unable to surmise the train of reasoning which led to this result, unless it was based upon a consideration of the terms of the British statute under which the proceedings were taken. But we submit, with confidence, that had the learned Judge been of the opinion that the instrument was a bottomry bond, and was payable notwithstanding the utter loss of the *Commerce* and her cargo and her crew, as is contended by the libellant here the *Cassa Marittima* would have received payment in full of its claim of £589, 1s. 4d.; since it appears that the owners of the *Commerce* received more than that amount in respect of their loss on freight alone, to say nothing as to their loss on hull.

It may properly be noted here that the United States Circuit Court of Appeals for the Second Circuit have decided, affirming the District Court, that these *Cassa Marittima* transactions are loans on freight.

The only other case on the point known to us is

Appleton *v.* Crowinshield, 3 Mass., 448.

Here the bond read:

> " If, therefore, the said schooner shall per-
> " form the said intended voyage or voyages,
> " and the said George, his heirs, executors or
> " administrators shall and do well and truly
> " pay, &c. * * * Or, in case said schooner
> " should be lost through perils of the sea or
> " by fire, or the enemies of the United States
> " while she is performing her said voyage or
> " voyages, then this obligation shall be void
> " and of none effect; but otherwise shall be
> " and remain in full force, strength and
> " virtue."

The schooner was captured by certain British subjects and taken into a West India port where she was condemned as lawful prize. From this sentence an appeal was taken to the Lords Commissioners of

Appeals in Great Britain, by whom the sentence was reversed; and a restoration of the vessel not being possible, the defendant was awarded full compensation for his schooner and her cargo and freight.

The Court held, in action of debt upon the bond, that an event within the condition of the bond had happened whereby the obligor is discharged from his contract although the defendant had recovered her FULL value.

S. C., 8 Mass., 430.

This was the second suit between the same parties, being assumpsit for money had and received, and a majority of the Court decided in favor of the plaintiff, partly, if not entirely, upon the construction of the treaty with Great Britain under which the award was made to the defendant by which he was FULLY compensated for all losses arising out of the capture, &c.

Sedgwick, *J.*, dissented, and his indignant protest against the decision, in what is probably one of the most elaborately argued case ever disposed of by a Massachusetts Court, is worth citing:

> "Indeed, I know no instance in which a "man can claim on principle of law a dis- "charge from a contract, according to the "stipulation of it, who can be bound on the "ground of the contract afterwards; which "is precisely what is claimed in the present "case. And if this principle is correct, as I "conceive it to be, the effect of the British "treaty is not necessary to be considered."

As the decision in the first suit on the bond (3 Mass.) is in our favor, and as the second suit turned on the construction of a treaty which is not an element in the case at bar, we submit that neither this case nor that of the *Empusa* support the libellants' contention.

It may properly be pointed out here that in the second case of Appleton *v.* Crowninshield (*supra*), it was found that the defendant had recovered *in full* for everything with interest, and the Court seems to have spelled a trust or duty of the treaty upon which they could take hold of the defendant according to well settled principles of equity jurisprudence.

Point II.

The first exception to the libel is well taken, and should have been sustained by the District Court.

Our first exception to the first and to each subsequent libel was that it did not state the nature of the action as required by the 23d Admiralty Rule of this Court.

Although a court of admiralty is said to be "elastic" and "liberal" in its practice and rulings in matters of pleadings and procedure, nevertheless, a *rule* is something to be obeyed, not evaded, and a deliberate, intentional, four times repeated evasion of one of the admiralty rules of this Court, persisted in after express objection taken by exception and oral argument had thereon, ought not to have been sanctioned by the District Court, still less ought it to have been rewarded by a decree in full, with interest before demand, and costs and disbursements.

The libel avers that it is "in a cause of action civil "and maritime of the kind and nature hereinafter "more fully described."

As the "kind and nature" are not thereinafter mentioned at all, this phrase evidently leaves it to the opposing counsel to draw his own conclusions on

the point, which conclusions are, of course, not binding on the libellants.

This is, we submit, a mere evasion of the rule, which is aimed at the libellant's pleader by requiring him to take up a position to which he must hold.

The explanation of this persistent evasion of the rule is, it seems to us, that the libellants' counsel was between the two horns of a dilemma and wished to avoid selecting either. If he averred a cause of bottomry and respondentia he exposed himself to the objection that the rules required the action to be *in rem*. If to escape this horn he took the ground which he afterwards urged upon the trial before the District Court that his clients' cause of action arose "in highest equity," he exposed himself to the objection that he had mistaken his form, and that on his own showing his relief was by an action at common law for money had and received or on the theory of his authority, Duncan *v.* Benson, or else by a bill in equity upon the theory of a violated duty as agent or as trustee.

Point III.

The second exception to the fourth libel is well taken and should have been sustained by the District Court.

This exception was that the libel did not state a cause of action.

Independently of other contentions urged elsewhere in this brief, we submit that there is a patent and fatal defect on the face of this libel.

We understand this Court to have declared that there can be no valid respondentia of cargo without due communication with its owners where such communication is possible.

The *Julia Blake*, 107 U. S., 418.

The libel avers (fol 10):

"The libellants, *not being fully advised of the* "*circumstances*, and believing that the said bond "was properly and necessarily issued, assented."

This is an admission and averment that due and full communication was possible, but was not had, and (since it is conceded that if the libellants were not obligated to pay the bond they can have no cause of action against us) states them out of Court.

In the Court below the learned counsel for the libellant discussed English and other cases in support of a different doctrine as to the necessity of communication, but in our judgment the question is not now open to discussion in this Conrt.

Other cases on bottomry and respondentia are:

The *Casa Marittima*, 2 Ap. C., 156.
The *Buonaparte*, 8 Mo. P. C., 459.
The *Hamburg*, 2 Mo. P. C. N. S., 289.
Cargo ex *Sultan*, 1 Swabey, 504.
The *Gratitudine*, S. C. Rob., 261.
Duncan v. *Benson*, 1 Exch., 557; *S. C.*, 3 Exch., 644.
The *Onward*, 4 Ad. and Ec., 57.
The *Lizzie*, L. R., 2 Ad. and Ec., 254.
The *Karnak*, 2 Ad. and Ec., 299.
The *Panama*, L. R., 3 P. C., 199.
Australasian S. N. Co. v. *Morse*, L. R., 4 P. C., 227.
Smith v. *Bank of N. S. Wales*, 4 P. C., 194.
The *Oriental*, 7 Mo. P. C., 398.
The *Pontida*, 9 P. D., 177.

The libellants' contention that there is a fatal defect in our case upon this point in that there is no issue raised by the pleadings, is untenable. The libel alleged in its fifth article a partial communication with the cargo owners, which allegations are expressly denied by the answer (Article 9, p. 12). Counsel seems to consider this "very indefi-

nite," but it is not seen how a denial *can* be indefinite although a statement or averment may have that vice. The trouble with the libel is that it was drawn upon the theory that we acted wickedly and wrongfully in beginning our voyage with an unseaworthy ship (fol. 8), and did further wrong in the port of distress by electing to carry forward a portion of the original cargo in the *Andrew Johnson* for "own advantage and not for the advantage of the libellants" (fol. 9). The proofs having shown this theory so utterly without foundation, counsel now has trouble in stretching his libel enough to make it appear to cover the theories he now argues. As to the counsel's statement (Brief, p. 38c.) that it has never been disputed that communication with the owner of cargo was in fact made, we refer to the record (fols. 3, 68) and to the respondent's sixth assignment of error (fol. 94).

We have always assumed that the master notified the cargo owners of his arrival in the port of distress, but probably (after the custom of ship masters) of but little of after events unless they applied for such information. This being so, it constituted a complete defense to the bond under the German Code, which the libellants, having knowledge of, were bound to insist on when payment of the bond was demanded of them.

The German Code, Section 504 (Transcript, p. 39), requires the master * * * "to take every pos-
" sible care that those interested in the cargo are
" speedily informed of such occurrences and of the
" measures thereby rendered necessary."

If the libellants, in stating their case to the Hamburg experts or arbitrators, had informed them, as by their fourth and final libel they have informed this Court (fol. 10), that they were not fully advised of the circumstances surrounding the transaction, there can be no doubt that the arbitrators would have held the bond void, in which event there could of course have been no claim against us.

Point IV.

The third exception to the libel is well taken and should have been sustained by the District Court.

The third exception was that the libel did not state any cause of admiralty and maritime jurisdiction.

Upon the libellants' own showing their alleged cause of action arose out of the receipt by the respondent of the *Thirlmere's* dividend from the English High Court of Justice in a statutory proceeding. No reason is perceived why this should give another admiralty court jurisdiction of an action to recover part of such dividend. If the libellants had a cause of action it should have been pursued in a court of equity. That this objection is one of substance and merit and not of mere form, easily appears upon consideration of the history of the case.

Notwithstanding the fact that the libellants and their London solicitors, Waltons, Bubb & Johnson, participated in the distribution of the *Thirlmere's* dividend (Transcript, 50-53) in 1885 and 6, the advocate who verified the libel swore (fol. 81) that the first knowledge he had of said proceedings was in July, 1890 (we accept the counsel's statement implicitly), and the final libel was filed about six years after the loss of the *Andrew Johnson*, the final decree not being entered until upwards of nine years after her loss. The libellants were thus allowed three opportunities and three years' time in which to shift their position in the litigation, while the respondent was denied a single opportunity to amend his answer, although he was a non-resident of this circuit. The record also shows that although the respondent was half insured and had repaid his underwriters half his *Thirlmere* dividend (fol. 39) at the time of the entry of the final decree the

Statute of Limitations had run against his claim, against his underwriters, to be recouped for half the amount of the final decree of the District Court ($9,598.94).

So that had the final decree of the District Court been carried into effect, the respondent, in place of the fine ship worth $60,000, and charter freight of over $20,000, making a total of over $80,000, which he had when the vessel left Caleta Buena, would have netted less than $15,000 (net *Thirlmere* proceeds, $5,000, less decree, $10,000,=$15,000), or an aggregate loss of $65,000, which loss was in fact diminished by the sum of $15,683 net payment by underwriters (fol. 39), leaving the respondent to sustain a net loss of nearly $50,000 by reason of a peril of the sea, against which he had contracted for a partial indemnity when his servant executed the bond carrying a bottomry premium of 17½ per cent.

The record also shows, although the amended libel upon which the libellant recovered said judgment was not filed until October 28, 1890, interest on the recovery was allowed from April 2, 1886, and finally, although the libellants had once already had their day in Court in England on the claim at bar and had been defeated, the respondent was not allowed a single opportunity to amend his answer by setting up such adjudication, although no claim of surprise to the libellants was made or could have been made.

We submit that no court of equity could, consistently with established practice, have treated a defendant so harshly as this respondent was treated by the District Court, even if both Courts should hold that the libellants had a cause of action against him.

Point V.

The respondent should have been allowed to plead "*res adjudicata*."

The many amendments and long delay of the libellants in averring facts within their own knowledge have already been mentioned.

The respondent's application was made before the reading of the depositions, and his rights were saved by due exception (fols. 23, 83).

The usual reasons for denying an amendment of a pleading are, 1st, surprise; 2d, loss of material witnesses. The first objection was not raised at bar; had it been raised it could have been cured by an adjournment of the trial; the second objection could not possibly arise, as the proof, if allowed, would have been documentary evidence of the libellants' proceedings in the London law suit.

Point VI.

The decree of the Circuit Court of Appeals should be affirmed, with costs.

Dated New York, March 18, 1897.

SIDNEY CHUBB,
Advocate for Respondent.

No. 40.

DEC 18 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,

Libellants.

No. 40.
October Term,
1897.

Please take notice that the annexed petition will be submitted to the Supreme Court of the United States on Monday, December 20th, 1897, at the opening of Court on that day, and that a motion will thereon be made for a reconsideration and amendment of the decree herein to the end that the mandate of the Court may direct that the cause be remanded to the District Court, with directions to enter a decree in favor of the libellants for one-half of the amount found due by the Commissioner.

Dated New York, December 16th, 1897.

SIDNEY CHUBB,
Advocate for Respondent.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN,

against

BRICE ALAN MILLER and others,

Libellants.

No. 40.
October Term,
1897,
Respondent's
Petition.

The respondent above named respectfully shows as follows:

The opinion of the Court herein states:

"It is also clearly inferable from the statements "in the affidavit we have referred to that when the "answer to the 3d amended Libel was filed the "proctor for the respondent knew of the transaction "with the Insurance Company."

The respondent herein has since given notice of motion to amend the decree of this Court to be entered on the foregoing opinion so as to allow them simple and compound interest and costs in all courts. That respondent is advised that the affidavit referred to in the foregoing extract from the opinion of this Court was not intended to give rise to the inference drawn by the Court, and that such inference was not correct. He is also advised that his counsel's objections to the allowance of interest by the District Court have not been and could not be argued in this Court, owing to the scope of the decree of the Circuit Court of Appeals, and the manner in which the issues were presented in this Court, and he submits to this Court that it is a hardship that he should be required to pay so large a sum of money as the libellants claim herein, even conceding their claim for a substantial recovery upon the merits as decided by this Court.

Wherefore he prays that this Court will reconsider and amend this decree so as to remand the cause to the District Court with instructions to that

Court so enter a decree for one-half the amount found due by the Commissioner, viz., the sum of $3,045.86.

EDWARD E. O'BRIEN,
By SIDNEY CHUBB,
Advocate.

I certify that I have examined the record of the proceedings in this cause in all courts and believe the above application of the respondent to be well founded and one that should be entertained and granted by this Court.

SIDNEY CHUBB,
Advocate.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term
1897.

Southern District of New York, ss.:

Sidney Chubb, being duly sworn, says that he was the proctor for the respondent O'Brien in the above entitled action in the District Court.

That deponent has never seen the said respondent O'Brien and that to the best of deponent's recollection and belief the first knowledge that deponent had of the insurance which the respondent O'Brien had upon the ship "Andrew Johnson" and of the payment thereof by the Insurance Company was obtained by reading a copy of the deposition of the said respondent Edward E. O'Brien as a witness for the LIBELLANTS sent to deponent from Portland, Maine, which deposition is printed at page 36 of the Apostles in the lower Court, and was taken before a U. S. Commissioner, pursuant to notice by the libellants. That deponent was not present at such examination, and the respondent was not cross-examined on his own behalf by any one.

That the following is an extract from said deposition:

"The Insurance Company paid me that sum "($30,000 less the premium note) on January 6th, "1885," so that at the time of the taking of the deposition the Statute of Limitation had already run against the respondent's claim for recoupment. That deponent did not move upon learning of said insurance to amend his answer, for the reason that as the evidence concerning it had already been brought into the case, as part of the libellant's

affirmative case, it was not necessary to move, inasmuch as the Court would take notice of it, and gave it its due legal effect, both according to the course of the District Court when sitting in admiralty and also according to the provisions of §723 of the Code of Civil Procedure of the State of New York, which provides among other things that the Court may upon the trial amend any process, pleading or other proceeding by conforming the pleading or other proceeding to the facts proved.

SIDNEY CHUBB.

Sworn to before me this
17th day of December, 1897.

LOUIS H. MAY,
Notary Public Kings Co.
[L. S.] Cert. filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term,
1897.

Memorandum on behalf of the respondent O'Brien.

It is submitted that the libellants, Miller *et al.*, should not recover interest herein nor recover more than one-half of the sum reported by the Commissioner,

First.—Because the damages were unliquidated and were not ascertained until the coming in of the Commissioner's report, which was in June, 1894. This long delay was occasioned in small part only by the time consumed in taking testimony. The greater part of the delay was caused by the libellants' failure to inform their proctors of a fact that was certainly within their own knowledge, inasmuch as they received a dividend from the "Thirlmere" proceeding, and they ought not therefore to be allowed to recover interest for a delay which they themselves were the cause, least of all in a cause where this delay has caused a loss to the opposite party of valuable rights, which he would have enjoyed but for the delay.

Second.—No proper claim for damages, even assuming that the merits of the case were with the libellants, was ever presented to the respondents before the interlocutory decree. There is ground for arguing that the average adjustment should be made according to the law of Chili, or according to the law of the port of destination, Germany, or ac-

cording to the law of the forum, but there is absolutely no ground for claiming that it should be made up according to the law of England, which is different from that of other nations in this respect and is testified in this case to so differ.

The respondent was required to cross-examine in London as to this adjustment, and upon his objection in the District Court the testimony in support of the adjustment was excluded and the adjustment not allowed in evidence, and the sum afterward found due by the Commissioner was considerably less than the amount named in the libel on the basis of this adjustment.

The libellants' proposition appears to be that, although both parties may have failed to communicate to their respective proctors knowledge of facts which were relevant and material to the issues, nevertheless the libellants should not only not suffer from their own delay, but should recover the interest that accrued during this interval, while the respondent is denied any relief whatever, although his is the more excusable omission, since a layman who was being sued about matters which happened partly in Chili and partly in Europe might not unreasonably suppose that matters transacted in Maine were not relevant to the litigation, and therefore not proper to be communicated to his counsel.

The record shows that a special assignment of error was made by the respondent to the allowance of interest by the District Judge, but as the Circuit Court of Appeals held that there was no liability on the part of the respondent it was not necessary for that Court to discuss the question of interest in their opinion. As it was not discussed in their opinion, the point was not therefore open for argument to the appellee in this Court, and he has therefore been without the benefit of a review of the District Judge's award upon this point.

The modification sought by the libellants will not only allow interest for the whole time, but also, inasmuch as the District Court decree included over

$3,000 interest, it will include interest on this, or compound interest, making an aggregate of over $12,000.

It is submitted, therefore, that the mandate of this Court should read as follows:

"The decree of the Circuit Court of Appeals must "be reversed and the cause remanded to the District "Court with direction to that Court to enter a "decree in favor of the libellants for one-half the "amount reported by the Commissioner," viz.: the sum of $3,045.87.

SIDNEY CHUBB,
Advocate.

No. 40.

FILED
DEC 17 18
JAMES H. McKEN

Supreme Court of the United States.

EDWARD E. O'BRIEN AGAINST BRICE ALAN MILLER and others, *Libellants.*	No. 40. October Term, 1897.

Please take notice that the annexed petition will be submitted to the Supreme Court of the United States on Monday, December 20th, 1897, at the opening of Court on that day, and that a motion will thereon be made for a reconsideration and amendment of the decree herein to the end that payment of interest upon the decree of the District Court of the United States for the Southern District of New York may be specially directed by this Court.

Dated New York, December 10th, 1897.

WILHELMUS MYNDERSE,
Proctor for Libellants.

To SIDNEY CHUBB, ESQ.,
Proctor for Edward E. O'Brien, 7 South William Street,
New York City.

Service of the foregoing notice and of the petition therein referred to is hereby admitted this 10th day of December, 1897.

SIDNEY CHUBB,
Advocate for E. E. O'Brien.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN AGAINST BRICE ALAN MILLER and others, Libellants.	No. 40. October Term, 1897.

The libellants above named respectfully show as follows:

The libellants, as owners of a cargo of nitrates shipped on the *Andrew Johnson*, filed their libel in the District Court of the United States for the Southern District of New York, on the 20th day of July, 1887, claiming contribution from Edward E. O'Brien, owner of the *Andrew Johnson*, for his share or portion of certain charges and expenses incurred by the master of the *Andrew Johnson* at Callao, a port of distress, and which the libellants had been required to pay under a bottomry and *respondentia* bond given by the said master affecting their cargo.

The respondents caused an adjustment to be stated upon such information as they could control, although naturally they, as owners of cargo, did not have full information respecting the expenses incurred.

Upon such adjustmentment they claimed $7,870.16 (*Record, p. 7*), and filed a libel in admiralty therefor.

The shipowner denied liability *in toto* and made no tender of any amount (*Answer, pp. 12, 13*).

Under the interlocutory decree of the District Court a new adjustment was ordered April 12th, 1894 (*Record, p. 48*), and the report of the adjuster showed that $6,091.73 principal was due from the shipowner as his share or portion of the expenses covered by the bond, and for this amount the District Court gave a decree July 12th, 1894, with interest thereon to the date of the decree (*Decree, pp. 55, 56*).

Upon an appeal by the shipowner to the United States Circuit Court of Appeals the decree of the District Court was ordered reversed May 6th, 1895 (*Record, pp. 67, 68*).

Thereupon the libellants applied to this Court for a writ of *certiorari*, which was granted May 7th, 1895 *(Record, p. 66)*.

This Court has, under date of November 29th, 1897, entered a decree reversing the decree of the United States Court of Appeals, and affirming that of the District Court of the United States for the Southern District of New York with costs, and directing that the cause be remanded to the said District Court accordingly. The decree does not specially direct the payment of interest upon the decree of the District Court, and the petitioners are advised that under the provisions of Rule 23 of this Court, sub-division 4, interest may not be allowed by the District Court in default of such special direction, this cause being an admiralty cause. The mandate has not yet issued.

The petitioners show that it is a hardship that they should be deprived of interest, the amount of their recovery being purely for moneys advanced for account of the shipowner, and in respect of which he has never made any tender.

The libellants therefore pray that this Court will reconsider and amend their decree so as to specially direct the payment of interest upon the decree of the District Court of the United States for the Southern District of New York.

BRICE ALAN MILLER and others,
Libellants.

By WILHELMUS MYNDERSE,
Proctor.

I certify that I have examined the record of proceedings in this cause, and believe the above application of the libellants to be well founded.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

AGAINST

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term, 1897.

Memorandum on Behalf of Libellants' Application for Amendment of the Decree.

This is a case in admiralty, wherein the decree of the District Court of the United States for the Southern District of New York has been affirmed with costs by this Court.

The rules of this Court provide as follows in respect of interest upon affirmance of decrees of lower Courts:

"In cases in admiralty damages and interest may be al-
"lowed if specially directed by the Court."

Rule 23, Subdiv. 4, as amended March 10th, 1890, 133 U. S., 711, Appendix.

Although the decree of the Circuit Court of Appeals has been reversed it is apprehended that the cause may be within the operation of Rule 23, inasmuch as the decree of the District Court has been affirmed, and if, in the discretion of this Court the libellants should have interest upon the District Court, decree, it is advisable that special directions be given therefor.

Decrees in admiralty are not infrequently for unliquidated amounts, as in salvage cases, detention cases, possessory actions and actions for personal injury, and for this reason it is presumed that the rules of this Court make distinct provision in respect of interest in admiralty causes.

In the case at bar, however, the recovery of the libellants is mere reimbursement for moneys advanced by libellants through their forced payment of the bottomry and respondentia bond, the amount being determined with exactness by

an adjuster. The shipowner has throughout denied all liability and has made no tender of any amount.

The situation was such that the District Court allowed interest upon the amount of the shipowner's assessed contribution to the date of its decree *(Decree, p. 55)*.

The execution of that decree was interrupted by an appeal taken by the shipowner to the United States Court of Appeals. The litigation has been long and costly to the libellants. They became involved in the matter as owners of cargo, without any direct action upon their part, and without any volition in the incurring of the original expenses.

We submit that under such circumstances they should be allowed at least such compensation as interest will give them.

WILHELMUS MYNDERSE,
Advocate.

No. 40.

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Supreme Court of the United States.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER AND OTHERS,
Libellants.

No. 40.
October Term, 1897.

Memorandum on behalf of libellants in opposition to O'Brien's motion to amend decree.

First. The proctor for the shipowner falls into the error of treating the libellants' action as one for unliquidated damages. The action was for contribution to the expenses of the port of refuge, all of which expenses had been paid by the cargo-owners.

The case was one of general average, and it was the duty of the master and shipowner to have an adjustment made up.

Heye vs North German Lloyd 33 Fed. Rep. 60, 71

This duty was not performed by either shipowner or master, to whom the details of all expenses were known. The shipowner and master having failed in their duty, the cargo-owners made as good an adjustment as they could.

Even after presentation of such adjustment, neither the shipowner nor master put forward a corrected statement, nor did they make any tender.

Under the interlocutory decree of the District Court a new adjustment was prepared, based upon the fuller information acquired in the course of litigation.

The amount determined by the adjustment was bare remuneration for money which the cargo-owners legally paid for account of the shipowner.

Second. There is no merit in the shipowner's suggestion that the shipowner should pay only one-half of the amount of the ship's contribution, because of his having been insured to the extent of one-half. The pleadings afford no support for any such claim.

Whatever the shipowner's proctor may have known, it is certain that the shipowner knew, from the moment he was sued in 1887, that he was subject to reimburse the cargo-owners, and he was put upon notice to maintain open relations with his underwriters.

The record shows that accounts were kept open between them to June 28, 1886 *(O'Brien 25)*, and there is no statement made by the shipowner, in his several applications to the Courts, that accounts have ever been closed. The only statement is that of the proctor, who does not allege any fact of prejudice, but only an inference of prejudice *(page 51)*.

Third. The motion of the shipowner to amend the decree should be denied, and the motion of the libellants to amend the decree in respect of interest should be granted.

WILHELMUS MYNDERSE,
Proctor for Libellants.

Syllabus.

O'BRIEN *v.* MILLER.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 40. Argued April 2, 1897. — Decided November 29, 1897.

The Johnson, an American ship, was chartered at Valparaiso to carry a cargo of nitrate of soda, of 1938 tons, from Caleta to Hamburg consigned to a London firm. On the way she sprang a leak, and put into Callao. There 1200 tons of the cargo were transferred to the Leslie, a British bark, and the Johnson was repaired, the master executing a bottomry bond to meet the expenses of the repairs. That bond bound the Johnson, cargo and freight, hypothecated the portion of the cargo transhipped to the bark and further provided that "if during the said voyage an utter loss of the said vessel" [*in the singular*] "by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty shall unavoidably happen," "then and in either of the said cases this obligation shall be void." Both vessels sailed for Hamburg. The Johnson collided at sea with the Thirlmere, a British vessel, and was sunk with a total loss. The bark reached Hamburg safely. The consignees, in order to obtain the cargo, agreed to refer to arbitration by German lawyers the question of its liability for the whole amount of the bond. They decided that it was so liable, and the consignees paid the amount of the bond and received the cargo. The owners of the Johnson libelled the Thirlmere and its owners. The latter were held not to be personally liable, and judgment was rendered only for the value of the Thirlmere. The insurers of the Johnson also paid to its owners the amount of the policies of insurance, and the latter, after receiving the amount of the judgment against the Thirlmere, paid to the insurers their proportionate part of it. This suit was then instituted by the consignors and the consignees of the cargo of the bark to recover from the owners of the Johnson their share of the sum paid on the bottomry bond. *Held*,

(1) That the terms of the bottomry bond included not only the Andrew Johnson and her cargo, but the cargo transhipped on the Leslie;

(2) That the owners of the Johnson, to the extent of the damages paid on account of the collision, were liable to the libellants, as creditors of the ship.

In interpreting a contract the whole contract must be brought into view, and it must be interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them: and this rule is especially applicable to the interpretation of contracts of bottomry and respondentia.

In an action to recover on a bottomry bond from the shipowner for ad-

vances made for his benefit and charged upon the property of the cargo owners by the master, if he questions the power of the master to execute the instrument of hypothecation it is his duty to plead it in defence.

The action of the district judge in refusing to permit the respondent to amend his answer by setting up the plea of laches and *res judicata* was not error.

THE case is stated in the opinion.

Mr. Wilhelmus Mynderse for Miller and others.

Mr. Sydney Chubb for O'Brien.

MR. JUSTICE WHITE delivered the opinion of the court.

By a charter party executed at Valparaiso, Chili, on April 5, 1884, Gibbs & Company, of the place named, chartered the ship Andrew Johnson to carry a cargo of nitrate of soda from Iquique and Caleta "to any safe port in the United Kingdom or on the continent between Havre and Hamburg, both included, as ordered." After loading at the places named, the Andrew Johnson, pursuant to orders, sailed on July 15, 1884, for Hamburg, the cargo on board being consigned to the order of Antony Gibbs & Sons, a firm doing business in London. On the 4th of August following, the vessel, being in distress, put into Callao. Certain necessary repairs, which were advised by a duly appointed board of survey, were made, and, upon the recommendation of the board, 8449 bags, or about 1200 tons, of the nitrate of soda were transhipped to the British bark Mary J. Leslie, to be conveyed, by that vessel, to Hamburg.

To defray the expenses incurred in the port of refuge, the master of the Andrew Johnson executed a bottomry and respondentia bond to the firm of Grace Brothers & Company. This bond not only bound the ship Andrew Johnson and her cargo and freight, but also, in express terms, hypothecated the cargo transhipped to the Mary J. Leslie. Although both cargoes were thus bound, the bond, in its defeasance clause, provided that it should be void "if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils

of the sea or navigation, or any other casualty shall unavoidably happen." A copy of the bond is found in the margin.[1]

The two vessels sailed for Hamburg. The Leslie arrived,

[1] Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship or vessel, called the Andrew Johnson, of Thomaston, Maine, of the measurement of nineteen hundred and thirty-eight tons or thereabouts, now lying in the port of Callao, am held and firmly bound to Messrs. Grace Brothers & Co., carrying on business at Lima and Callao under the firm of Grace Brothers & Company, in the penal sum of thirteen thousand two hundred and seventy-three Peruvian silver soles $\frac{72}{100}$, at forty pence to the sole, equal to two thousand two hundred and twelve pounds 5*s.* 9*d.*, of good and lawful money of Great Britain, to be paid to the said Grace Brothers & Co., or any of them, or to their or any of their order, certain attorney, executors, administrators or assigns, or to such person or persons as they or any of them shall appoint by endorsement thereon in the name of their firm of Grace Brothers & Co. to receive the same.

For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of said vessel and her cargo of nitrate of soda, including about twelve hundred tons of nitrate of soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof, firmly by these presents, sealed with my seal. Dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, the said vessel lately sailed from Caleta Buena, laden with a cargo of nitrate of soda, bound therewith to Hamburg in Germany, and during the prosecution of the said voyage sprang a leak, whereby she took in water at sundry times to such an extent that it was deemed expedient by the said master, for the safety of the vessel and the benefit of all concerned, to bear up for Callao, which was accordingly done, and on arrival at Callao aforesaid the vessel was duly surveyed by competent surveyors and certain repairs were recommended to be done to enable the said vessel to continue the voyage with safety, and also to tranship to another vessel about twelve hundred tons of the cargo laden on board the aforesaid Andrew Johnson in order to enable her to proceed on her voyage with perfect safety.

And whereas all necessary repairs and supplies have been made to the said vessel, and the said portion of cargo transhipped to the Mary J. Leslie to enable her to prosecute her said voyage, and she is now in a seaworthy condition and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his said vessel which he is totally unable to defray and make good, save and except upon the security of the bottom of his said vessel and her cargo and freight, hath been necessitated to

but the Johnson perished at sea as the result of a collision with the British ship Thirlmere. After the arrival of the Leslie at Hamburg, demand was made upon the representa-

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raise the sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{72}{100}$ silver, or its equivalent in British sterling, for the payment of the debts incurred as aforesaid, and to enable the said vessel to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit or that of the owners of the said vessel, or in any other way than by bottomry and hypothecation of the said vessel, her boats, apparel, cargo and freight.

And whereas the said Grace Brothers & Co. have, at the request of the above-bounden James H. Killeran, agreed to lend and advance to him the sum of thirteen thousand two hundred and seventy-three soles, $\frac{72}{100}$ silver, or its equivalent, at forty pence as aforesaid, in British sterling, for the purposes aforesaid, upon his executing this present bond or obligation and hypothecation of the said vessel, her boats and apparel and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Brothers & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel Andrew Johnson, her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid and for securing the repayment of the said sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{72}{100}$ silver, or its equivalent in British sterling as aforesaid, the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Brothers & Co., their executors, administrators and assigns.

Now, the condition of this obligation is such, that if the said vessel shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, their or any of their order, attorneys or attorney, executors, administrators or assigns, or unto such person or persons as they or any of them shall appoint by endorsement under their or his hand or hands in the name of their or his firm of Grace Brothers & Co., or otherwise, upon this present obligation the sum of two thousand two hundred and twelve pounds 5*s.* 9*d.* British sterling money, being the principal money of this obligation, and the further sum

tives of Antony Gibbs & Sons, the consignees of the nitrate of soda, which had been shipped on the Leslie, for payment in full of the amount of the bond, and, in order to obtain possession of the cargo, the consignees entered into an agreement by which the question of the liability of the nitrate of soda on the Leslie for the entire amount of the bond was to be determined by arbitration, the arbitrators to be selected by and their decision to be binding upon the respective parties. It is to be inferred that the only question controverted before the arbitrators was whether the use of the words "said vessel" in the defeasance clause of the bond operated to avoid the bond in consequence of the wreck of the Andrew Johnson and the loss of her cargo. The German lawyers who were selected as arbitrators found that the nitrate of soda on board the Leslie was bound for the whole amount of the bond, and that, therefore, the consignees were not entitled to the cargo unless they paid the bond. Their award was as follows:

"We formulate the question which you, in the names of Messrs. Antony Gibbs & Sons and Messrs. Baring Brothers & Co., have submitted to our judgment as follows:

"Whether the portion of the cargo of nitrate of soda of the

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of three hundred and eighty-seven pounds three shillings of like money for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds 10 per centum, making together the sum of two thousand five hundred and ninety-nine pounds 8*s*. 9*d*. British sterling, and also do and shall on demand well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, or to their or any of their order, attorneys, endorsers, executors, administrators or assigns, all such costs, charges and expenses as they or any of them shall or may have incurred, sustained or be put to in or about the recovery of the aforesaid principal money and premium, or any part thereof, or otherwise howsoever in the premises.

Or if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue.

In testimony whereof, the said James H. Killeran hath, to these presents, and to a duplicate and triplicate thereof, set his hand and seal after careful reading, in the presence of the undersigned witnesses, the day and year first before written.

Andrew Johnson, brought home per Mary J. Leslie, is liable for the whole amount of the bottomry bond, which was signed in Callao, and whether, consequently, the receiver of this portion of the cargo has to pay the whole of the bottomry bond, provided the value of this portion of the cargo is not less than the amount of the bottomry debt?

"This question we must answer in the affirmative, because, according to the law here, ship, freight and cargo of the Andrew Johnson, as well as the portion of the cargo which was transhipped into the Mary J. Leslie, are jointly liable for the whole amount raised on bottomry at Callao, and, therefore, the Andrew Johnson and her cargo having become a total loss, the holder of the bottomry bond can come upon that portion of the cargo which was shipped by the Mary J. Leslie for the whole amount of his claim.

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent or appear to be lent contingent upon the safety of the Andrew Johnson, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason, that if the bottomry bond were interpreted in this manner, the cargo of the Mary J. Leslie would be entirely liberated, after the loss of the Andrew Johnson occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested."

Antony Gibbs & Sons paid the amount of the bond for account of Gibbs & Company, the consignors. Subsequently, the owners of the Andrew Johnson commenced legal proceedings against the Thirlmere to hold that vessel responsible for the collision by which the Johnson and her cargo were lost. The Thirlmere availed herself of the statute of Great Britain

limiting the liability of shipowners, and the result was an award finding the Thirlmere to be wholly at fault, and condemning her to pay the loss caused by the sinking of the Johnson. As their proportion of the ascertained value of the Thirlmere, the owners of the Johnson for ship and freight were allowed the sum of £6557 9*s.* 6*d.*, but from this amount there was deducted about £1500 for certain expenses. In the proceedings in question, the owners of the nitrate of soda which was on the Johnson also recovered their proportion of the value of the Thirlmere. On account of the loss of the Andrew Johnson, the Boston Marine Insurance Company paid to her owner the sum of $30,000 less $2825.49, the amount of a premium note with interest, and out of the sum received by the owner of the Andrew Johnson for the ship and freight from the value of the Thirlmere, the owner of the Andrew Johnson, in April, 1896, remitted to the insurance company as its share thereof the sum of $11,456.05, and to correct some mistake in calculation the sum of $35.60 was also subsequently paid by the shipowner to the insurance company.

The present suit was commenced on July 20, 1887, by a libel *in personam* against the owner of the Andrew Johnson to recover the due proportion of the sum paid on the bond. Those joined as libellants were eleven in number; that is, all the members composing the firm of Gibbs & Company, the consignors of the nitrate of soda, and the members of the firm of Antony Gibbs & Sons, the consignees. The original libel is not in the record. Exceptions to it were filed on the ground that it did not state the nature of the action and that it did not state a cause of action. On June 6, 1888, the district judge overruled the exception to the want of clearness in the averments of the libel, but maintained the exception of no cause of action. Although the learned judge found that the bottomry bond had not been avoided by the loss of the Andrew Johnson and her cargo, and therefore that the payment made at Hamburg was necessary, he yet concluded that as the Andrew Johnson and her cargo had proven a total loss, nothing having been alleged in the libel as to a recovery by reason of such loss, the libellants were precluded from

enforcing their claims *in personam* against the owner of the Johnson in consequence of the provision of the acts of Congress limiting a shipowner's liability for the acts and contracts of the master to the value of the ship and freight. 35 Fed. Rep. 779. As a result, on the 27th of June, 1888, an order was entered sustaining the exception of no cause of action, and directing that, unless the libel were amended, it be dismissed with costs. An amended libel was filed in July, 1888, to which an exception of no cause of action was again sustained, with leave further to amend. On January 4, 1889, the libel was for the second time amended, and this was also excepted to, on the ground of ambiguity, and that it did not state a cause of action. On the 24th of October, 1890, the libel was again amended by averring the loss of the Johnson, the fact that it had occurred by collision with the Thirlmere, the institution of proceedings against the Thirlmere by the owner of the Johnson, and the recovery in those proceedings on the ground that the collision had been caused solely by the fault of the former vessel. In June, 1891, respondent filed exceptions and an answer to this amended libel. The answer, among other things, averred as follows:

"This respondent admits that the owners of the ship Thirlmere, having taken appropriate proceedings under the statutes of the United Kingdom of Great Britain and Ireland, obtained a decree limiting their liability for said collision to a certain sum, which they thereupon paid into the court, and which said sum was distributed between the libellants and the respondent herein, and other parties and their attorneys, in part satisfaction of the damages by each of them sustained by reason of said collision, but this respondent denies that he received the said sum of £3557 9*s.* 6*d.*, and avers that the amount received by him was much less than said sum."

No allusion was made in the pleadings of the respective parties to the fact that the owner of the Andrew Johnson had received the benefit of any insurance upon the vessel.

After the taking of proof the cause was heard on the exceptions and merits on November 23, 1893. At the outset

of the hearing the trial court overruled all the exceptions to the third amended libel but that of no cause of action, and referred this latter exception to the merits. Before the case was finally submitted the respondent moved the court to be allowed to amend his answer so as to plead two additional and distinct defences:

"First, to as much of the libellant's claim as arises out of the limited liability proceedings in the English court as to the Thirlmere, the defence of laches on the part of the libellant in not sooner bringing that matter before the court.

"Also as to the same portion of his claim, the defence *res judicata*, because passed on by the English court."

This request was refused and exceptions to the refusal were noted. The court, on the merits, held that the bottomry bond, at the time of its payment, was a valid obligation; that in view of the fact that the bond embraced not only the cargo on the Johnson, but also the cargo on the Mary J. Leslie, that the words "said vessel" in the defeasance clause must be considered as referring to the cargo on both vessels, and, therefore, the obligations of the bond were not avoided by the loss of the Johnson and her cargo; that the owners of the Johnson having recovered from the Thirlmere, up to the value of the latter vessel, damages for the collision, were not discharged from personal liability under the acts of Congress, inasmuch as the sum recovered from the Thirlmere was greater than the amount sought to be enforced *in personam* against the owner. 59 Fed. Rep. 621. In conformity to the opinion of the court, an interlocutory decree was entered on April 3, 1894, referring the matter to a special commissioner to ascertain and report the amount the libellants were entitled to recover. On April 10, 1894, the respondent again applied to the court for leave to amend his answer by setting up the two additional defences of laches and *res judicata*, and the request was again denied. On June 5, 1894, the report of the commissioner was filed, finding the libellants entitled to the principal sum of $6091.73, and on July 16, 1894, a final decree for that sum with interest and costs was duly entered. By the final decree seven of the libellants, that is to say, those who composed the firm of

Antony Gibbs & Sons, were dismissed on the ground of a want of interest, the court having found that the bond was paid by the consignees for account of the consignors, and they, therefore, were alone interested in the suit. On appeal to the Circuit Court of Appeals, the judgment of the trial court was reversed. The appellate court concluded that the words "said vessel" in the defeasance clause of the bond were free from ambiguity, and left no room for construction, and, therefore, that the loss of the Andrew Johnson with her cargo had operated to avoid the bond according to its tenor, and that the payment made of the amount by the consignees was hence unnecessary, and gave rise to no legal claim against the master or owner of the Johnson. 35 U. S. App. 138. In consequence of the allowance of a writ of certiorari, the cause is here for review.

In the discussion at bar many minor questions have been pressed upon our attention, but the pivotal controversy rests upon the ascertainment of the true meaning of the bottomry bond, and the obligations, if any, which arose from its payment. We forego the present consideration of the more unimportant questions in order to at once approach the fundamental issues in the cause. The libellants assert that from the terms of the bond as a whole, it manifestly results that the cargo of the Leslie was liable despite the loss of the Johnson and her cargo; that hence the consignees of the cargo, on the Leslie, were obligated to pay the bond, and that on their doing so there arose a legal duty on the owner of the Johnson to pay the proper proportion thereof, which obligation, it is claimed, can be enforced despite the loss of the ship, since the owner had recovered and retained the amount awarded against the Thirlmere. On the other hand, the respondent asserts that the words of the bond providing for its avoidance in case of the loss of "said vessel" are free from ambiguity and give no room for construction, and that even if this be not the case in consequence of the loss of the Johnson, the consignors who paid the bond are not entitled, under the limited liability acts, to recover any proportion thereof.

There can be no doubt that, considered in themselves and

alone, there is no ambiguity in the words found in the clause of the contract providing that "if during said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall inevitably happen, . . . this obligation shall be void." But the question presented involves not the interpretation of this language apart from the whole agreement, but is, on the contrary, the ascertainment of the meaning of the entire contract. The fallacy which underlies the assertion as to want of all ambiguity in the bond arises, therefore, from presupposing that in order to establish want of ambiguity in a contract a few words can be segregated from the entire context, and that because the words thus set apart are not intrinsically ambiguous, there is no room for construing the contract itself. In other words, the confusion of thought consists in failing to distinguish between the contract as a whole and some of the words found therein. If the erroneous theory were the rule, then, in every case, it would be impossible to arrive at the meaning of a contract, in the event of difference between the contracting parties, since each would select particular words upon which they relied, and thus frustrate a consideration of the whole agreement. The elementary canon of interpretation is, not that particular words may be isolatedly considered, but that the whole contract must be brought into view and interpreted with reference to the nature of the obligations between the parties, and the intention which they have manifested in forming them. *Boardman* v. *Reed*, 6 Pet. 328; *Canal Co.* v. *Hill*, 15 Wall. 94.

This general rule of construction should especially guide a court of admiralty in interpreting a contract of bottomry and respondentia.

In the exercise of their jurisdiction with respect to such bonds, courts of admiralty are not governed by the strict rules of the common law, but act upon enlarged principles of equity, per Story, J., in *The Virgin*, 8 Pet. 538, 550; and the same learned justice, in the case of *Pope* v. *Nickerson*, 3 Story, 486, said: "A court of admiralty in cases within its civil jurisdiction acts as a court of equity, and construes in-

struments, as a court of equity does, with a large and liberal indulgence."

To quote the language of the judicial committee of the Privy Council in *The Prince George*, 4 Moore P. C. 28: "Bottomry bonds for the benefit of the shipowners and the general advantage of commerce are greatly favored in courts of admiralty, and where there is no suspicion of fraud every fair presumption is to be made to support them."

We reach, then, under the light of these principles, the consideration of the contract, for the purpose of ascertaining its meaning and enforcing the intention of the parties to be derived from all the stipulations therein found. There can be no doubt that the terms of the bond included not only the Andrew Johnson and her cargo, but the cargo transhipped on the Leslie, for the bond says: "For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of the said vessel and her cargo of nitrate of soda, including about 1200 tons of nitrate of soda, transhipped on board the British bark Mary J. Leslie, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof."

In the recitals of the bond, where a statement is made of the facts creating the necessity for the loan, the intention of the master to include the cargo transhipped on the Leslie is also unequivocally expressed. Likewise in the recitals which relate to the conditions upon which the lenders have agreed to advance the money required, it is again stated that they have consented so to do upon the master's executing "this present bond or obligation and hypothecation of the said vessel, her boats and apparel, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie, and the freight to be earned and become payable in respect to the said cargo, and the said Grace Brothers are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel Andrew Johnson, her boat, tackle, apparel and furniture, together with the cargo

laden on board as aforesaid, and the freight to be earned and become payable as aforesaid, and for securing the repayment of the said sum . . . he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transhipped to the Mary J. Leslie and the freight to be earned and become payable in respect to the said voyage, unto the said Grace Brothers, their executors, administrators and assigns."

The cargo on the Leslie having been hypothecated along with that on the Johnson, and the bond declaring that it was upon the faith of such hypothecation that the money was advanced, the claim that because of the use of the word "vessel" in the singular, the bond was to be avoided by the loss of the Johnson, despite the arrival of the Leslie, amounts to contending that although both parties declared that the money was lent on the faith of both cargoes, and that without the pledge of both it would not have been advanced, yet that they immediately stipulated that it should be secured upon only one of the objects hypothecated.

Deriving the meaning of the parties from their situation and their intentions as declared in the contract, it becomes impossible in reason to construe the word "vessel" in the defeasance clause as not applying to both the Johnson and the Leslie. It is conceded that the value of the Johnson and her cargo was enormously in excess of the sum of the bond; this having been the case, to hold that the hypothecation of the cargo on the Leslie was only to be availed of in case of the arrival of the Johnson and her cargo, would be to determine that the cargo on board the Leslie was only to be resorted to by the bondholder, in the event recourse against that cargo should be superfluous. We cannot construe a contract for security so as to render the security available only in case resort to it should become unnecessary. True, it is sought to escape the dilemma resulting from this reasoning by saying that the object which the parties had in view was a resort to the cargo of the Leslie in case the Johnson and her cargo arrived in such a damaged condition as to render it necessary that the cargo

of the Leslie should be called upon for an average contribution. But this explanation only accentuates the dilemma, since it contends that the lenders were to have recourse to the cargo of the Leslie in case the security resulting from the Johnson and her cargo was partially impaired, and not in the event that it was wholly so. But, obviously, if the security of the cargo of the Leslie was contemplated and provided for by the parties, as it manifestly was, the contract should not be held as meaning that the security was to be availed of only in the event that the value thereof was required to pay a part of the debt, and it was not to be resorted to when a greater reason for so doing existed. There are many other conditions of the bond which with equal force refute the attempt to limit the word "vessel," in the defeasance clause, to the Johnson, and which irresistibly make the language of the defeasance clause harmonize with the nature and extent of the security afforded by the bond. Thus, the clause as to the arrival of the vessels made no distinction between the Johnson and the Leslie. It cannot be contended that, if the Leslie had arrived at the port of destination before the Johnson, her cargo could have been discharged without payment of the bond.

The contemporaneous construction of the contract given by the masters of the Johnson and Leslie is shown by the bill of lading which was given by the one and taken by the other for the nitrate of soda which was transhipped on the Leslie. On this bill of lading the following endorsement was placed:

"The 8449 bags of nitrate of soda, as per this bill of lading, are included in and jointly responsible with the nitrate of soda specified in the bottomry and respondentia bond given to Messrs. Grace Brothers & Company as security for the payment of the Amer. ship Andrew Johnson's disbursements in Callao."

We conclude that to give the construction to the bond claimed by the shipowner would not only do violence to the expressed intentions of the parties and their contemporaneous interpretations of its meaning, but would also be adopting, to quote the language of Sir James Colville in *The Great Pacific*, L. R. 2 P. C. 254, "so improbable an hypothesis that the construction is only to be admitted if there is no escape from it."

We may properly say of the bond under consideration what was said by the Supreme Court of Pennsylvania in *Insurance Company* v. *Duval*, 8 S. & R. 147, in speaking of a form of respondentia bond in use in Philadelphia, which partook of the character of a loan coupled with a contract of insurance:

"Contracts of this kind are so different in different countries, (although they resemble each other in some prominent features,) that when disputes arise they are to be decided by the words of the particular contract in question rather than by any principles of general commercial law. In the present instance, therefore, we must endeavor to ascertain the meaning of the bond, and be governed by it."

In the case just referred to, the loan was upon goods ladened upon a vessel, and it was a condition of the contract that the loan was to be paid within a certain period *after the return of the vessel* to Philadelphia, her home port, or in the event of an utter loss by certain enumerated sea risks, the bond was to be void. On the return voyage, the vessel was condemned and sold at an intermediate port, and the goods on board were sent to Philadelphia in other vessels and delivered to the defendants, and according to an agreement annexed to the respondentia bond were sold by them. In an action brought to recover the difference between the price realized from the sale and the amount of the loan, the defendants contended, among other defences, that the terms of the bond did not make the repayment of the loan dependent upon the return of the goods, but upon the return of the vessel, and that as the vessel did not return, the day of payment had not arrived. The court pointed out the extraordinary consequences which would follow the construction contended for, and held that, even if under a literal interpretation the right to recover did not exist, a resort to the spirit of the contract and the intention of the parties would entitle the lender to judgment, as the goods and not the vessel were the sources from which the defendants expected to derive the means of payment.

Our conclusion being that the bond was not avoided by the loss of the Johnson, and was a valid and subsisting obligation,

at the time of its payment, by the owners of the cargo, on the Leslie, the question which arises is, — can the cargo owners recover by an action *in personam* against the shipowner the due average proportion of the expenses at the port of refuge, incurred for the benefit of the ship and freight? The manifest result of the obligation of the cargo owners to pay the bond before they could obtain delivery of the goods was that they were obliged to discharge the part of the debt which was due by the ship Johnson. This, in effect, gave rise in their behalf to a claim against the ship for a breach of the contract of affreightment or charter party, by virtue of which the property of the owners was received on the Andrew Johnson to be transported to Hamburg, and there delivered to the order of the consignees named in the charter party on payment of the freight therein specified. Had a portion of the cargo not been delivered, or been delivered in a damaged condition by the fault of the master, the right to proceed in admiralty to recover the damage sustained would have been clear. *The Schooner Freeman*, 18 How. 182; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 462. Delivering the cargo charged with a lien for an indebtedness of the shipowner is no different in principle or effect from the non-delivery of a portion or the whole in a damaged condition. It is also analogous in principle to a jettison of a portion of the cargo for the benefit of the ship and the remainder of the cargo, when a clear right to contribution would exist, enforceable in admiralty. *Dupont* v. *Vance*, 19 How. 162, 168. As said in the latter case by Mr. Justice Curtis, delivering the opinion of the court: "The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law." And, whilst in the same case, (page 169,) the power of the master to hypothecate or sell a part of the cargo to enable him to prosecute the voyage was declared to exist, the obligation of the shipowner, under the law of the sea, to reimburse the cargo owner for the due proportion of the loss was clearly stated.

The shipowner being liable for his average portion of the

loss, the question is, Was he discharged therefrom by the loss of the Johnson and her cargo, although the owner has recovered and retains the sum awarded as damages against another ship for having brought about the loss? The answer to this question involves a consideration of the proper construction to be given to the act limiting the liability of shipowners.

The original act, approved March 3, 1851, c. 43, 9 Stat. 635, was carried forward into the Revised Statutes as sections 4282 *et seq.*

Section 4283 declares that the liability of the owner of any vessel for various acts and things mentioned "shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

Section 4284 describes the liability as "the whole value of the vessel, and her freight for the voyage"; and section 4285 declares that it shall be a sufficient compliance with the law if the owner transfer his *interest in such vessel and freight, for the benefit* of the claimants, to a trustee.

Section 4283 was amended by the act approved June 26, 1884, c. 121, 23 Stat. 53, 57, so as to do away with the restrictions upon the character of debts and liabilities against which the limitation might be asserted. This amendment, however, is not material to the question now considered.

The clear purpose of Congress was to require the shipowner, in order to be able to claim the benefit of the limited liability act, to surrender to the creditors of the ship all rights of action which were directly representative of the ship and freight. Where a vessel has been wrongfully taken from the custody of her owners or destroyed through the fault of another, there exists in the owner a right to require the restoration of his property, either in specie or by a money payment as compensation for a failure to restore the property. Manifestly, if the option was afforded the owner of the ship to receive back his property or its value, he could not, by electing to take its value, refuse to surrender the amount as a condition to obtaining the benefit of the act.

In *The City of Norwich*, 118 U. S. 468, where the obliga-

tion of a shipowner to account for the sum of insurance recovered on the loss of his ship, was fully considered, the fact was declared to be that the provisions of the act of Congress, just referred to, were in conformity with the general maritime law of Europe (502). The text of the Ordonnance de la Marine of 1681, and the opinions of Pardessus and other continental jurisconsuls, were referred to as the sources from which the principles embodied in the act of Congress were derived. The language of Pardessus clearly shows that, under the general maritime law, the obligation of the owner was to surrender a sum awarded as damages for the loss of his ship, and, if he did not, he could not avail himself of the limitation of liability. He says (Droit Commercial, part 3, title 2, ch. 3, sec. 2):

"The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and, if they are lost, it suffices for his discharge to surrender *all claims in respect of the ship and its freight.*"

So, also, Kaltenborn, in a treatise published at Berlin in 1851, as translated and quoted in the dissenting opinion in *The City of Norwich*, *supra*, says:

"The Roman law, which held the owner absolutely liable with all his property, is nowhere put in practice, and was not current as early as the Middle Ages. Indeed, the Consulate of the Sea, ch. 183, 224, 236, the law of Wisby, reasoning from Arts. 13 and 68, that of the Hanse Towns, reasoning from Art. 2, title X, render the owners, as a rule, answerable only to the extent of the ship's value; and the modern maritime laws free the owners, by the *abandon* of the ship and their several shares in the vessel, from all further liability for the ship enterprise, particularly for the acts and contracts of the captain. *In the ship are included all gains arising during the voyage, as well as the insurance.* Should the ship and the freight have perished, it is sufficient for exoneration of the owners *if all claims and causes of action having reference to the vessel and freight are abandoned by them.*"

The same doctrine is clearly recognized in the provisions of

the General German Commercial Code, where, in Art. 778, it is provided as follows:

"Art. 778. In cases of general average, the compensation for sacrifice or damage takes, as against the ship's creditor, the place of that which the compensation is to make good.

"The same rule applies to the indemnity, which in case of loss or damage to the vessel or of nonpayment of freight when goods have been lost or damaged, is due to the shipowner by the party who has caused the damage by his illegal conduct.

"When the compensation or indemnity has been received by the shipowner, he is personally responsible to the ship's creditors to the extent of the amount received in the same manner as to the creditors of a voyage in case of encashment of the freight."

Indeed, that a right of action for the value of the owner's interest in a ship and freight is to be considered as a substitute for the ship itself, was decided in this court in the case of *Sheppard* v. *Taylor*, 5 Pet. 675. That was a case where a vessel had been seized, condemned and sold by the Spanish authorities because of a violation of the trade regulations of the kingdom of Spain. The King of Spain subsequently ordered the proceeds of the vessel and cargo to be repaid to the owners, but this was not done; afterwards the owners, having become insolvent, assigned their claims for the restoration of the proceeds and for indemnity from Spain to their separate creditors, and the commissioners under the Florida treaty awarded to be paid to the assignees a sum of money, part for the cargo, part for the freight, and part for the ship. The officers and seamen having proceeded against the owners of the ship by a libel *in personam* for their wages, and having afterwards, by an amended libel *in personam*, claimed payment out of the money paid to the assignees of the owners under the treaty, it was held that they were entitled, towards the satisfaction of the same, to the sum awarded by the commissioners for the loss of the ship and her freight, with certain deductions for the expenses of prosecuting the claim before the commissioners.

Mr. Justice Story, delivering the opinion of the court, said (p. 710):

"If the ship had been specifically restored, there is no doubt that the seamen might have proceeded against it in the admiralty in a suit *in rem* for the whole compensation due to them. They have by the maritime law an indisputable lien to this extent. This lien is so sacred and indelible that it has, on more than one occasion, been expressively said that it adheres to the last plank of the ship. 1 Peter's Adm. note 186, 195; 2 Dodson's, 13; *The Neptune*, 1 Hagg. Adm. 227, 239.

"And, in our opinion, there is no difference between the case of a restitution in specie of the ship itself and a restitution in value. The lien reattaches to the thing and to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of courts of common law and equity. The owner and the lienholder, whose claims have been wrongfully displaced, may follow the proceeds wherever they can distinctly trace them. In respect, therefore, to the proceeds of the ship, we have no difficulty in affirming that the lien in this case attaches to them."

Nor does the ruling in *The City of Norwich*, *supra*, that the proceeds of an insurance policy need not be surrendered, by the shipowner, conflict with the decision in *Sheppard* v. *Taylor*. The decision as to insurance was placed on the ground that the insurance was a distinct and collateral contract which the shipowner was at liberty to make or not. On such question there was division of opinion among the writers on maritime law and in the various maritime codes. But as shown by the full review of the authorities, found in the opinion of the court, and in the dissent in *The City of Norwich*, all the maritime writers and codes accord in the conclusion that a surrender, under the right to limit liability, must be made of a sum received by the owner, as the direct result of the loss of the ship, and which is the legal equivalent and substitute for the ship.

We conclude that the owner who retains the sum of the damages which have been awarded him for the loss of his ship and freight has not surrendered "the amount or value" (sec.

4283) of his interest in the ship; that he has not given up the "whole value of the vessel" (sec. 4284); that he has not transferred "his interest in such vessel and freight" (sec. 4285). It follows that the shipowner, therefore, in the case before us, to the extent of the damages paid on account of the collision, was liable to the creditors of the ship, and the libellants, as such creditors, were entitled to collect their claim, it being less in amount than the sum of such proceeds.

The remaining questions are free from difficulty. It was urged below and is pressed at bar that the amended libels disclosed no cause of action, because it was not specifically alleged that the master of the Johnson communicated with the cargo owners before consenting to the bond.

It was said in *The Julia Blake*, 107 U. S. 418, 425, "it is now the settled law of the English courts that a master cannot bottomry a ship without communication with owner, if communication be practicable, and, *a fortiori*, cannot hypothecate the cargo without communicating with the owner of it, if communication with such owner be practicable." A particular review of the doctrine laid down by the English courts was however rendered unnecessary in the case of the *Julia Blake*, as the circumstances in that case clearly established that the hypothecation of the cargo was unwarranted, irrespective of the failure to communicate with the owner of the cargo. In the case of *Glascott* v. *Lang*, 2 Phillips' Ch. 310, decided in 1847, Lord Chancellor Cottenham declared that no authority existed to support the claim that a bottomry bond executed upon a vessel might be avoided because the captain, though having opportunity to do so, failed to communicate with the owners before giving the bond. In *The Karnak*, L. R. 2 Ad. & Ec. 289, Sir Robert Phillimore thus referred to the subject:

"I think it will be found upon examination of the foreign maritime law that the bottomry bond, under the various titles of *contrat à la grosse aventure*, *hypotheca*, *bodmer*, or *cambio maritimo*, was always considered as binding the cargo, and that the necessity of a special communication, if possible, of the master with the owner of the cargo, according to the doc-

trine of recent cases, however just in principle, is peculiar to the English law."

The rule declared to be settled in Great Britain by the cases of *The Bonaparte*, 8 Moore P. C. 459; *The Hamburg*, B. & Lush. 253, 273; *S. C.* 2 Moore P. C. (N. S.) 289, 320; *Australasian Steam Navigation Company* v. *Morse*, L. R. 4 P. C. 222, was, in 1877, thus stated by the Privy Council in *Kleinwort* v. *Cassa Marittima*, 2 App. Cas. 157:

"That it is an universal rule that the master, if in a state of distress or pressure, before hypothecating the cargo, must communicate or even endeavor to communicate with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said, that in general it is his duty to do so, or it is his duty in general to attempt to do so. . . . If according to the circumstances in which he is placed it be reasonable that he should — if it be rational to expect that he may — obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt."

As in the case of the *Julia Blake*, however, we find it unnecessary to determine in the case now before us whether the rule laid down by the courts of Great Britain is the doctrine of this court. Under that rule, it is only where, *under all the circumstances of the case*, communication with the owners of the cargo was feasible, that a failure to attempt to communicate will avoid the bond. Now, in the case at bar, the pleadings do not aver nor does the evidence establish whether communication was had by the master with the owners of the cargo before the execution of the bond, nor that such communication was feasible or might reasonably have been had. While it may be inferred from the averment in the libel that the libellants assented to the bond, "believing that the said bond was properly and necessarily issued," that such assent was given subsequent to the execution of the bond, the language used does not imply that the master had not communicated with the cargo owners before making the hypothecation. As

the bond does not import to the contrary, the master must be presumed to have lawfully executed it. The necessity for the hypothecation and that the course pursued was for the best interests of the cargo owners is established by the evidence. Under such circumstances, we think the duty was upon the party who questioned the power of the master to have executed the instrument of hypothecation to plead it as a matter of defence. *The Virgin*, 8 Pet. 538, 550. Particularly is this the case when, as here, the recovery sought from the shipowner is for advances made for *his benefit*, which were charged upon the property of the cargo owners by the representative as well of the shipowner as the owners of the cargo. Whether, under the circumstances, an estoppel might not arise, need not be determined.

But one matter remains to be considered, and that is as to the action of the District Judge in refusing, on the hearing and subsequently, to permit the respondent to amend his answer by setting up the plea of laches and of *res judicata* as respects the allegation for the first time made in the third amended libel of the receipt by the owner of the Andrew Johnson of partial compensation from the owners of the ship Thirlmere for the loss of the Andrew Johnson and her freight. The third amended libel was filed October 28, 1890, and the exceptions and answer thereto were filed June 22, 1891. The trial took place on November 22, 1893. It appears from the papers used in support of the motion filed after the trial of the case that the claim made in the admiralty proceedings in England, that the cargo owners should be credited from the ship's share of the moneys paid into court by the owners of the Thirlmere with the ship's proportion of the bottomry bond, was rejected, because of a supposed want of jurisdiction. Indeed, the proctor for the respondent, in an affidavit filed in support of the renewed application for leave to amend the answer, stated as a reason for not setting forth the defences in question in the answer to the amended libel that he "was then of the opinion that his client was entitled to judgment on the defences then set up" and that he "was then advised that the presentation and rejection by the English admiralty court of the libellants'

claim, founded on their payment of the bottomry bond, did not, according to the law of England, amount to an adjudication thereon, for the reason that the said English court of admiralty was without jurisdiction thereof."

It is also clearly inferable from the statements in the affidavit we have referred to that when the answer to the third amended libel was filed the proctor for the respondent knew of the transaction with the insurance company. Even, therefore, if the fact was, as claimed, that the respondent would have been entitled to receive from his underwriters one half of whatever decree the libellants might be entitled to recover, had the same been secured with reasonable diligence, and that respondent had lost said recourse by reason of the bar of the statute of limitations, still there is no pretence that the respondent was misled into believing that the libellants had abandoned their claim against him, and the fact was that they promptly brought suit in this country to recover against the shipowner. Without considering the averment in the last amendment to the libel, by which the recovery by the owner of the Johnson from the Thirlmere was alleged, the first libel informed the respondent that the claim arising from the bond was pressed against him. If between the time of the filing of the first libel (July 20, 1887) and the time of the hearing (November 22, 1893) a claim against an insurance company in favor of the respondent was lost by laches, such loss was the result of his own conduct.

Under all the circumstances, particularly as the rejection of the claim in the courts of Great Britain was not upon the merits, we are of opinion that the trial court did not abuse its discretion in refusing leave to amend the answer.

The decree of the Circuit Court of Appeals must be reversed, and that of the District Court affirmed, and it is so ordered.